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REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench,

Since the Time of LORD MANSFIELD'S coming to preſide in it.

By Sir JAMES BURROW.

With TABLES,

Of the NAMES of the CASES,

AND

Of the MATTER contained in them.

VOLUME the SECOND:

Beginning with *Michaelmas* Term 32 *G.* 2. 1758.

AND

Ending with *Trinity* Term 1 *G.* 3. 1761, (inclusive).

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NOTWITHSTANDING what has been *hinted* in the *Preface*, and *expreſsly declared* in the *Advertiſement* prefixed to the former Volume, in Excuſe at leaſt, if not in Juſtification of reporting *fully and circumſtantially* ſuch Caſes as may deſerve it; Yet it may be thought that *two* of the Caſes in that Volume are unreaſonably long.

In *this* Volume, I recollect but One, of any conſiderable Length: And I flatter My ſelf that Few would wiſh to have had it much curtailed.

Inner Temple:
6th November 1771.

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Michaelmas

* Michaelmas Term

* P. 653.

32 Geo. 2. B. R. 1758.

Rex *verſ.* Athay Eſq;

Monday, 6th November 1758.

ON ſhewing Cauſe Why a Rule ſhould not be made abſolute, for an Information againſt a Juſtice of Peace, for a Miſdemeanour in *refuſing to grant a Licence* to one *Francis Simes* (who had been licenſed for ſeveral preceding Years) to ſell Ale, as uſual; and afterwards convicting him, WITHOUT any previous *Summons*, for having ſold it without a Licence; It appeared that the *pretended Grounds* upon which this Rule had been applied for and obtained, were either falſe or fallacious. The firſt was, That the *only* Reaſon why the Licence was refuſed him, was his declining to *pay a Sum of Money* (5*l*) which was claimed of him upon a diſtinct and collateral Account, and which he denied to be due from him: The Payment of which Sum of Money was (as He alledged) inſiſted upon by the Juſtice, as a Condition precedent to his granting the Man a Licence. The ſecond pretended Ground of the Motion was "that the Juſtice had convicted him of the Offence, without "any previous Summons."

As to the firſt—The COURT were unanimous, that the Allegation appeared to be falſe in Fact: But, at the ſame Time, they declared explicitly, "That Juſtices of Peace "have *no Sort of Authority* to annex any ſuch *Conditions* to "the Grant of theſe Licences."*

* V. *ante*, 561. and *poſt*, *pa.* 1318. *Paſch.* 1762. 2 G. 3.

As to the ſecond—They eſteemed it to be fallacious, as the Fact came out upon ſhewing Cauſe: For the Man was actually *preſent* before the Juſtice (who *had ſent for him*;) and was ſo far from offering at making any Defence, that he rather ſeemed to apply for Mercy; declaring, however, "that if the Juſtice did convict him, he would not pay the "Penalty."

* P. 654. * Thirdly. The COURT obſerved that the Man had *not* any where *alledged* "*That he was* INNOCENT of the Of-"fence:" Which they thought it *incumbent upon him* to have done, to intitle himſelf to make this Application againſt the Juſtice of Peace.

RULE DISCHARGED.

Tueſday, 7th November 1758.

Rex *verſ.* Fielding Eſq;

ON ſhewing Cauſe why an Information ſhould not be granted againſt Mr. *Fielding*, for a Miſdemeanour in his Office of a Juſtice of the Peace, the Complaint appeared to be frivolous and vexatious; ſo that the Juſtice ought to have the Coſts he had been put to, in defending himſelf againſt it: The only queſtion was, *Who* ſhould *pay* them.

The Complaint was made upon a Joint-Affidavit made by the Proſecutor *and his Attorney*: Which *Attorney* was alſo ſworn to have *declared*, (and in rude and virulent Terms too,) "That *if it ſhould coſt* HIM 100*l.* He would lay "*Fielding* by the Heels."

It was ſtrongly urged, on behalf of the Attorney, that it would be a very great Diſcouragement to Attornies, in the Courſe of their practice, if THEY were to be made *perſonally liable to Coſts*, in Caſe their Clients Motions ſhould not ſucceed, which Motions they had engaged in at the Application of their Clients, and upon Facts *repreſented to them by* their Clients, as being true and candidly ſtated; and which they themſelves could not know or ſuſpect to be otherwiſe: And that it would be ſtill more hard upon them, to do this *without hearing* what they could urge in their own Defence.

But the COURT (*viz.* Lord *Mansfield*, Mr. Juſt. *Foſter*, and Mr. Juſt. *Wilmot*) were clear and unanimous, that in *this* Caſe, they might and ought to do it; becauſe the Attorney not only appeared *as* PROSECUTOR *by* JOINING *in the Original Affidavit* of Complaint; but had alſo expreſsly * declared "That if it ſhould coſt HIM 100*l.* he "would lay *Fielding* by the Heels." Therefore they

DISCHARGED the Rule; with Coſts to be *paid* by Both.

* The Attorney, by a ſubſequent Affidavit, denied this. However, the Rule ſtood, as above.

Pomp

* Pomp *verſ.* Ludvigſon.

* P. 655.

Saturday, 11th *November* 1758.

A Rule for diſcharging the Defendant upon *Common* Bail, was made abſolute; the Affidavit to hold him to Special Bail, *not* being POSITIVE: Which it is the * eſtabliſhed Rule of the Court, "that it *muſt* be."

* So was the Reſolution in *Innys* v. *Sinclaire*, *Paſch.* 1733, 6 *G.* 2. *B.R.* and in *Holmes et al'* v. *Mendes Ceſis et al.' Tr.* 1733. 6 & 7 *G.* 2. *B. R.* and in *Leverland* v. *Baſnet*, *Tr.* 16 *G.* 2. *B. R.* and in *Claphamſon* v. *Bowman*, *P.* 18 *G.* 2. *B. R.* and in *Rios* v. *Belifante*, *P.* 17 *G.* 2. *B. R.* and in *Coillot* v. *Hague*, *Tr.* 1747, 21 *G.* 2. *B. R.* and in *Van Moorſell* v. *Jullien*, *M.* 1748, 22 *G.* 2. *B. R.* and in *Kelly* v. *Devereux*, *M.* 1752, 26 *G.* 2. *B. R.* and in *Prior* v. *Scot*, *H.* 1753. 26 *G.* 2. *B. R.* To which Reſolutions the preſent one being added, this Point ſeems to be moſt fully ſettled. Yet v. *poſt.* 1032. and *Barclay et al'* v. *Hunt*, *M.* 1766. 7 *G.* 3. *B. R.*

Lord MANSFIELD ſaid that the Act of Parliament required a *poſitive* Oath of the Debt: Which poſitive Oath may not be contradicted by the Defendant.

But Mr. Juſt. FOSTER ſaid, He Himſelf had always thought the Rule *too ſtrict*; And that He had *never complied* with it at his Chambers, though He would not go *againſt* it.

The preſent Caſe was that of a Merchant in *London*, whoſe Correſpondent in *Sweden* had ſent him over the Accounts from *Sweden where the Debt aroſe*: And conſequently the Plaintiff, the Merchant here, could only ſwear to *his* BELIEF, with a *Reference* to the Accounts ſent to him from *Sweden*; the Fact itſelf not being within his own *perſonal* Knowledge. So that the Affidavit could not have been more poſitive than it was; unleſs the Correſpondent in *Sweden* had come over hither, to ſwear it: (For an Affidavit *ſworn there* could not have been read here.)

See the Act of Parliament of 12 *G.* 1. *c.* 29. § 2. intitled, "An Act to prevent frivolous and vexatious "Suits:" Which enacts "That no Perſon ſhall be "held to ſpecial Bail, upon any Proceſs iſſuing out of "any Superior Court, where the Cauſe of Action "ſhall not amount to the Sum of 10*l.* or upwards; "nor out of any Inferior Court, where the Cauſe of "Action ſhall not amount to the Sum of Forty Shil-"lings or upwards." Then the ſecond Clauſe directs the Method, in Caſes where the Cauſe of Action *does* amount to thoſe reſpective Sums.

And the Words of this Second Clauſe of the Act are— "That in all Caſes where the Plaintiff or Plaintiffs "Cauſe of Action ſhall amount to the Sum of Ten

* P. 656. " * Pounds, or 40*s.* or upwards, as aforeſaid, *Affidavit* " ſhall be made and filed, OF *ſuch Cauſe of Action*; " And the Sum or Sums ſpecified in ſuch Affidavit, " ſhall be indorſed on the Back of ſuch Writ or Pro- " ceſs: *For which* Sum or Sums ſo indorſed, the She- " riff or other Officer, to whom ſuch Writ or Proceſs " ſhall be directed, ſhall take Bail; and *for no more.*"

The preſent Defendant was diſcharged on Common Bail.

Tueſday, 14th November 1758.

Bruckleſbank *verſ.* Smith Eſquire.

THIS was a ſpecial Verdict from *Northumberland* Aſſizes, upon an Action of Treſpaſs for breaking and entering the Plaintiff's Ship in the River *Tyne*, at *Newcaſtle* upon *Tyne*, and taking and carrying away an anchor—: To which the Defendant pleaded " Not guilty."

The ſpecial Verdict finds, that the Defendant was a Juſtice of the Peace of and for the Town and County of *Newcaſtle* upon *Tyne*; And that the Plaintiff was Maſter of a Ship called the *Leeds-Merchant*, floating, *&c*, in the River *Tyne*, being a navigable River; That 3 Tons of Ballaſt and more were unloaded *out of* the ſaid Ship, INTO a Machine or Veſſel called a *Hopper*, in the ſaid River, *with Intent* that it ſhould be carried therein, into the High and open Seas; And that it *was accordingly carried out of* the ſaid River, *into the high and open Seas*, and was *there* caſt out of the ſaid Hopper, where the Water was more than 14 Fathom deep, at a Diſtance from any Port, Haven, Channel or navigable River. It finds that *Thomas Field*, before the Time of the ſuppoſed Treſpaſs, *viz.* on ſuch a Day *&c*, came before the Defendant, being a Juſtice of Peace *&c*, and laid Information of the Facts of " putting the Ballaſt *into the* " *Hopper* with an *Intent that it ſhould be dropped* out of the " ſaid Hopper INTO *the* WATER, and NOT *be caſt* " *&c*, *upon the* LAND *where the Tide and Water never* " *flows or runs*;" *contrary* to the Statute. It finds that the Plaintiff was ſummoned to appear, and that he did appear before the ſaid Juſtice; and that *Proof* was then and there made by his Confeſſion, " That it was ſo put *on board the* " *Hopper*, in the ſaid River, *with Intent* that it ſhould be " therein carried out of the ſaid River *into the High and* " *open Sea*, and caſt *therein* at the Depth of 14 Fathom and " upwards at a Diſtance from any Haven *&c* (*ut ſupra*) " where the Tide or Water never flows or runs." It is found That the Defendant thereupon *convicted* the Plaintiff, and adjudged him to be an Offender againſt the Statute of 19 *G.* 2. *c.* 22. Then it finds the Conviction before the Juſtice,

* Juſtice, *in hæc verba*; and that the then Defendant (the now Plaintiff) was adjudged to forfeit 2 *l.* 10 *s.* for the ſaid Offence. * P. 657.

It finds that the Juſtice of Peace (the now Defendant) iſſued his Warrant under his Hand and Seal, to levy the ſame by Diſtreſs &c; And that *William Bruce*, a Serjeant at Mace (to whom the Warrant was directed,) by Virtue of the ſaid Warrant took the ſaid Anchor &c.

This Caſe was firſt argued, on *Friday* the 9th of *June* laſt, by Mr. *Winn* for the Plaintiff, and Mr. Serjeant *Poole* for the Defendant.

Mr. *Winn* rehearſed the Statute of 19 *G.* 2. *c.* 22. § 1, 2. And ſaid That the Fact found to have been *proved*, is no *Offence within* this Act: And conſequently, the Defendant was a Treſpaſſer, in levying the Penalty. Nothing is found to have been proved but a *mere* INTENTION.

This is a *pœnal* Law, and muſt be conſtrued *ſtrictly*.

34, 35 *H.* 8. *c.* 9. § *ult.* gives the Penalty for caſting Rubbiſh into Havens, Roads, Channels &c. Then 19 *G.* 2. *c.* 22. deſcribes the Offence to be caſting, throwing out or unlading any Ballaſt, Rubbiſh &c, "BUT ONLY *upon* "*the* LAND, where the Tide or Water never flows or "runs." And the Preamble deſcribes the Miſchief to be "Caſting, throwing out and unlading their Ballaſt, either "on the Shore, or on the Side, and *below* the uſual and full "Sea-Mark, and doing other Annoyances, *to the Detriment* "*and Obſtruction of Navigation*."

In the *Thames*, this Method of diſpoſing of the Ballaſt is never treated as an Offence: And that is under the Care and Inſpection of the *Trinity-houſe*.

The Miſchief which the Legiſlature had in View, was throwing the Ballaſt &c, either on the Shore, or on the *Sides of Rivers*, and below the full Sea-Mark.

But this was in the open and high Sea, above 14 Fathom deep; at a Diſtance from any Port, Haven, Channel, or River.

He relied upon the *Intention* and *Spirit* of this Law, rather than upon the *Letter* of it: Which Intention of the Act, he ſaid, would plainly appear from the Proviſo at the End of it (*V. Sect. Penult*) and that it was intended ſolely to prevent Prejudice to the Navigation in Havens, Ports, Roads, Channels or Rivers, and for no other Purpoſe. But Nothing

* P. 658. * Nothing is ſtated here of any Sort of Prejudice actually done to the Navigation or even of any ſuch Intention to prejudice the Navigation of the Haven, Port, Road, Channel or River.

The Ballaſt was carried *out of* the River, into the High and Open Sea; and *there* caſt out, at above 14 Fathom Depth, and at a Diſtance from any Port, Haven, Channel or River.—And the *Intention only* is laid accordingly.

And the Confeſſion is of Nothing more than *ſuch* an Intention. But there is neither Proof nor Confeſſion of any *Fact* whatſoever: Nor was any actual *Injury* done.

Mr. Serjeant *Poole contra*, for the Defendant—It was impoſſible for Us, in the Nature of the Thing, to *prove* "That "the Ballaſt *was* ACTUALLY dropped in the River:" For this is done privately from the Bottom of the Hopper. It was neceſſary therefore for Us to charge the *Intent* as the Offence. And this Intent the Defendant has *confeſſed*. And the *Offence* as We have charged it, is within the Act; *viz.* "Putting the Ballaſt into the Hopper, with Intent &c."

This is a *poſitive Law*, "That no Perſon ſhall caſt, "throw out, or diſcharge out of &c, any Ballaſt &c; BUT "ONLY *upon the Land*, where the Tide or Water *never* "*flows or runs*," To which poſitive Law, the Fact charged is *directly contrary*. The preſent Act of 19 *G* 2. was made to inforce and make more eaſy the proſecuting Offences againſt the former Statute of 34, 35, *H.* 8: upon which it was difficult to proſecute the Offender, in ſome Caſes. And here are proper Exceptions, upon proper Occaſions: In all other Reſpects it is a general Law.

It is ſaid indeed, on the Part of the Plaintiff, "that here "is no actual Prejudice done to the Navigation." But what the Plaintiff has done, *may*, by ſome Means or other, prejudice the Navigation of the River: It is in their Power, to drop the Ballaſt out of the Hopper, in the *Channel* of the River, without any Poſſibility of being diſcovered.

And this Statute is in negative Words, *viz.* "BUT ON-"LY upon the *Land*." *Co. Lit.* 115. affirms that there is a Diverſity between an Act of Parliament in the Negative, and One in the Affirmative; and ſhews ſuch Diverſity.

Therefore he prayed Judgment for the Defendant.

Mr.

* Mr. *Winn*, in Reply—This act ought to be conſtrued *ſtrictly*; As it is a Reſtraint of a Common Law Right which a Man has to lay his Ballaſt where he pleaſes; provided he be not Guilty of a Nuiſance, in ſo doing. * P. 659.

And this is no Offence againſt the *Spirit* and *Intention* of this Law. Nothing is charged, but an *Intent*: Which Intent was not, even if it had been *executed*, a *ſubſtantial* Offence againſt this Law.

Lord MANSFIELD—This is a *General* Queſtion, which goes farther than this particular Caſe.

Mr. Juſt. FOSTER aſked if the Corporation of *Newcaſtle* were not Conſervators of the River *Tyne*.

It was anſwered "That they were."

Mr. Juſt. FOSTER—Corporations ought to be protected in their juſt and ancient Rights.

THE COURT did not, upon this firſt Argument, give any Opinion: But it was ordered to ſtand for a further Argument.

ULTERIUS CONCILIUM.

And now, Mr. *Clayton* argued on Behalf of the Plaintiff, (as before) "that this Fact found was *not* an Offence with-"in the Act."

Mr. *Norton* was going to anſwer Him, on the Part of the Defendant. But

Lord MANSFIELD ſtopped him from entering into it at all; It being a very plain Caſe, and clearly againſt the *expreſs* Prohibition of the Act; Which provides that it ſhall *not* be thrown BUT *upon the Land*: Whereas this Man ſays that he has found a better Way, than that which the Act has *expreſsly* preſcribed.

But here is ſuch an Opening to Fraud, in this Way that he has thought a better One, that it would be dangerous to truſt to this Method, though it were not prohibited. However, it is enough, that it is contrary to the *direct* and *expreſs* Proviſion of the Act.

Indeed, if it was put upon the Hopper, *in Order merely to carry it upon the* LAND; that would only be the proper Means of doing it, and therefore would not be an Offence againſt the Act. But this is with Intent to lay it in the WATER.

And

* P. 660. * And there can be no Security as to the *Place where* the Hopper may *drop it*. It is mighty eaſy, from the Conſtruction of the Hopper, to drop it privately: And it is alſo the Intereſt of the Perſon who carries it in the Hopper, to drop it as ſoon as he can; that he may come the ſooner again, to fetch more.

The Shifting it out of one Ship into another, WITHOUT *Intention to drop it* ANY *where*, would not be a Caſe within the Act: For that would not be a *Caſting or throwing out* at all, *within* the Meaning of the Act.

The other THREE JUDGES agreed, in Terms, with Lord *Manſfield*; And All of them ſpoke explicitly to the ſame Effect.

Per Cur. unanimouſly,
JUDGMENT for the DEFENDANT.

Michel *verſ.* Cue et Ux'.

ON ſhewing Cauſe againſt ſetting aſide an Execution for Irregularity (which Irregularity was the Suing out the *Execution above a Year after the Judgment* obtained, WITHOUT *any Scire facias* to revive it,) it appeared that the *whole Delay* had ariſen from the Part of the *Defendant*, by Bills in Chancery for *Injunctions*, and by obtaining *Time for Payment &c.*

And though the Caſes of *Winter* v. *Lightbound* in 1 *Strange* 301. and of *Booth* v. *Booth* in 1 *Salk.* 322, were urged as Authorities in Point on the Part of the Defendants; Yet

THE COURT were unanimous that this Rule of "reviving a Judgment of above a Year old, by a *Scire fa-* "*cias*, before ſuing out Execution upon it," which was *intended* to prevent a SURPRIZE *upon the Defendant*, ought not to be taken Advantage of by a Defendant who was ſo far from being *ſurprized* by the *Plaintiff*'s Delay, that *He himſelf* had been trying all Manner of Methods whereby HE *might delay the Plaintiff*: And therefore they not only diſcharged the Rule, but diſcharged it with *Coſts* too.

Rule DISCHARGED with *Coſts*.

Thomas

* *Thomas Baſkett* and *Robert Baſkett*, Adminiſtrators (with the Will annexed) of *John Baſkett*, Plaintiffs: The Chancellor, Maſters, and Scholars of the Univerſity of *Cambridge*, *Joſeph Bentham*, and *Charles Bathurſt*, Defendants. * P. 661.

THE Plaintiffs brought a Bill in the Court of Chancery, for an *Injunction* to reſtrain the Defendants from *Printing* or *Selling* a *Book*, intitled "An exact *Abridg*-"*ment* of all the *Acts* of *Parliament*, relating to the Exciſe "on Beer *&c.*" And on the Hearing of this Cauſe, the 24th of *January* 1743, the Lord Chancellor ordered that a Caſe ſhould be ſtated, for the Opinion of the Judges of the Court of King's Bench, upon the ſeveral Acts of Parliament, Letters-Patent and Grants of the Crown inſiſted on by either Side, and any other Letters-Patent appearing upon Record relating to the Matters in queſtion between the Parties.

The ſeveral Letters-Patent inſiſted on by the Plaintiffs in Support of their Claim, as the *King's Printer*, to the *Sole* and *Excluſive* Right of printing and publiſhing all *Acts* of *Parliament* or *Abridgments* of *Acts* of *Parliament* *&c.* bear Date the 22d of *April* 1 *Edw.* 6. the 29th of *December* 1 *Mariæ*, the 24th of *March* 1 *Eliz.* the 27th of *September* 19 *Eliz.* the 8th of *Auguſt* 31 *Eliz.* the 10th of *May* 1 *J.* 1. the 11th of *February* 14 *J.* the 20th of *July* 3 *C.* 1. the 26th of *September* 11 *C.* 1. the 24th of *December* 27 *Car.* 2. and the 13th of *October* 12 *Ann:* Which Letters-Patent are ſeveral Grants of the Office of King's Printer of all and ſingular Statutes, Acts of Parliament, *&c.* The Letters-Patent of the 12th of Queen *Ann* are a Grant, in Reverſion, of the ſaid *Office*, for the Term of 30 Years, to commence after the Determination of a former Grant then in being: They expreſsly grant the *Sole* Power of printing all and all Sorts of Abridgments of all and ſingular Statutes and Acts of Parliament, and *probibit* all other Perſons to print any Volume Book or Work of which the Printing was thereby granted. The Eſtate and Intereſt granted by the ſaid Letters-Patent commenced upon the 10th of *January* 1739; and afterwards became veſted in *John Baſkett*, the Father of the now Plaintiffs; and is now veſted in the *Plaintiffs*, as Adminiſtrators to their ſaid Father with his Will annexed: And the Plaintiffs have been ſworn and admitted into the ſaid Office of *his Majeſty's Printer*.

The Caſe further ſtated, that the Plaintiffs and Other Printers to his Majeſty and his Royal Predeceſſors have, by Virtue

* P. 662. * Virtue of the ſaid ſeveral Letters Patent to them reſpectively granted, from Time to Time printed All Acts of Parliament and Abridgments of Acts of Parliament, Bibles, New Teſtaments, and other Books mentioned in the ſaid Letters-Patent. And the Plaintiffs claim the SOLE *Right* of printing *All* Acts of Parliament, EXCLUSIVE of *All other Perſons*, during the Term granted by the ſaid Letters Patent of the 12th of Queen *Ann*.

The *Defendants* founded their Claim upon the ſeveral Letters-Patent and Act of Parliament following.

King *Henry* the 8th by his Letters-Patent bearing Date the 20th of *July* in the 26th Year of his Reign, for Him and his Heirs, granted *Licence* to the Chancellor Maſters and Scholars of the Univerſity of *Cambridge*, that They and their Succeſſors for ever, by their Writing under the Seal of the ſaid Chancellor, from Time to Time might aſſign and chooſe and for ever have among themſelves and within the Univerſity aforeſaid always remaining and inhabiting, *Three Stationers and Printers* or Venders of Books, as well aliens and born without as Natives and born within his ſaid Majeſty's Obedience, having and holding as well hired Houſes as Houſes of their own: Which ſaid Stationers or Printers in Form aforeſaid aſſigned, and any of them, *might lawfully there print all Manner of Books approved* or which thereafter ſhould be *approved* by the ſaid Chancellor or his Vice-Chancellor and three Doctors there: And as well *thoſe Books* as *other Books* printed whereſoever, as well within his ſaid Majeſty's Realm as without *ſo as aforeſaid approved* or to be *approved*, might *put to Sale*, as well within this Kingdom whereſoever they ſhould pleaſe, *&c*; and that, without Penalty.

The Statute of 13 *Eliz c.* 29. confirms All Letters-Patent, *&c*, granted to the ſaid Univerſity.

By Letters-Patent dated 6th *February* 3 *Car.* 1. reciting the ſaid Letters-Patent of 26 *H.* 8. and the ſaid Act of Parliament of 13 *Eliz.* And alſo reciting "that ſince "the ſaid Act of Parliament, divers Letters-Patent had "been made, by Queen *Elizabeth*, King *James* the Firſt, "and his then Majeſty, granting Authority to print divers "and ſundry Books, and prohibiting generally All other "Perſons to print the ſame;" and alſo reciting a Decree in the Court of Star-Chamber, of the 23d *June* 28 *Eliz.* and a Proclamation of the 25th of *September* 21 *Jac.* 1. inforcing the ſame; The King *confirms* the Right granted by the ſaid Letters Patent of 26 *H.* 8. to the Univerſity of *Cambridge*, *notwithſtanding* any Grant or Prohibition contained in the ſubſequent Letters-Patent or any of them.

The

* P. 663.

* *The Queſtions* upon this Caſe are—

1ſt. *Whether* the Plaintiffs are intitled to the *Sole Right* of printing *Acts* of *Parliament* and *Abridgments* of *Acts* of *Parliament*, *excluſive* of *All* other Perſons, during the Term granted by the ſaid Letters-Patent dated the 13th of *October* in the 12th Year of the Reign of Queen *Ann*.

2d. *Whether* the Defendants, the Chancellor, Maſters and Scholars of the Univerſity of *Cambridge*, by Virtue of the Grants and Acts of Parliament inſiſted on by the ſaid Defendants, or any of them, *have* the *Right* or *Privilege* of printing *Acts* of *Parliament* or *Abridgments* of *Acts* of *Parliament*.

This Caſe was firſt argued in *Michaelmas* Term 1745, by Mr. *Comyns* for the Plaintiffs, and Mr. *Noel* for the Defendants. It was argued a ſecond Time in *Michaelmas* Term 1747, by Mr *Gundry* for the Plaintiffs, and Sir *Richard Lloyd* for the Defendants. It was argued a third Time in *Hilary* Term 1749, by Mr. *Hume* for the Plaintiffs, and Mr. *Henley* for the Defendants It then ſtood for the Certificate of the Judges; Which having been put off for ſeveral Years during the Life of the Lord Chief Juſtice *Lee*, the Parties did not apply to have it argued again, whilſt the Lord Chief Juſtice *Ryder* lived: But in *Trinity* Term 1758, they applied to have it ſet down for further Argument, in the next *Michaelmas* Term.

Before it came on, The Court ordered Copies of all the abovementioned Letters-Patent, Acts of Parliament, and Inſtruments to be left with them: They alſo ordered Copies of the Charter to the Stationers of *London*, of the 4th of *May* 3 & 4 *Ph. & Mar.* of the Grant to the Univerſity of *Oxford*, "to print Books, dated the 13th of *March* 8 *Car.* 1; and the Grant "to print Law-Books," dated 12th of *Auguſt* 9 *G.* 2; and the Proclamation of the 25th of *September* 21 *Jac.* 1. againſt the diſorderly printing of Books; and the ſeveral Decrees of the Court of Star Chamber relative thereto.

On the 17th of *November* 1751, It was argued by Mr. *Comyns* for the Plaintiffs, and Mr. Solicitor General *(Yorke)* for the Defendants.

And very ſoon after this laſt Argument, the following Certificate was made.

Having

* P. 664.

* " *Having* heard Counſel on both Sides, and conſidered " of this Caſe, We are of Opinion that during the " Term granted by the Letters-Patent dated the " 13th of *October* in the 12th Year of the Reign of " Queen *Ann*, the Plaintiffs are intitled to the Right " of printing Acts of Parliament and Abridgments of " Acts of Parliament, excluſive of all other Perſons " not authorized to print the ſame by Prior Grants " from the Crown.

" *But* We think, that by Virtue of the Letters-Patent " bearing Date the 20th Day of *July* in the 26th Year " of the Reign of King *Henry* the 8th, and the " Letters-Patent bearing Date the 6th of *February* " in the 3d Year of the Reign of King *Charles* the " Firſt. The Chancellor Maſters and Scholars of " the Univerſity of *Cambridge* are intruſted with a " *concurrent Authority* to print Acts of Parliament " and Abridgments of Acts of Parliament within " the ſaid *Univerſity*, upon the Terms in the ſaid " Letters-Patent.

" MANSFIELD.
" T. DENISON.
" M. FOSTER.
" E. WILMOT.

" 24th *November*, 1758."

Friday, 17th *November* 1758.

Dr. Burton *verſus* Thompſon.

ON ſhewing Cauſe againſt a Rule for a NEW TRIAL, which had been moved for by the Plaintiff, upon an Allegation " That the Verdict (which was found for the " Defendant) was given *contrary to Evidence*;"

Mr. Juſt. FOSTER (who tried the Cauſe) now reported, That it was an Action for a Libel; that the Charge *was proved* by the Plaintiff; but that the *Injury* done to him thereby, appeared upon the Evidence to be *ſo* VERY INCONSIDERABLE, that if the Jury had found for the Plaintiff, He ſhould have thought a *Half-Crown*, or even a *much ſmaller Sum* to have been *ſufficient* Damages: But that the Jury had gone too far; and inſtead of giving the Plaintiff very ſmall Damages, had found a Verdict *againſt* him; which was certainly a Verdict AGAINST *Evidence*.

Lord

* Lord MANSFIELD—It does not follow by neceſſary Conſequence, that there muſt ALWAYS be a new Trial granted, in *all* Caſes whatſoever, where the Verdict is *contrary to Evidence:* For it is poſſible that the Verdict *may ſtill* be on the Side of the *real* Juſtice and Equity of the Caſe. And of this, there are ſeveral Inſtances in the * printed Books; particularly the Dutcheſs of *Mazarine*'s Caſe in 2 *Salk.* 646. [*Deerly* v. the Dutcheſs of *Mazarine:* Which is directly in Point.] * P. 665.

* See Title *Trial* in 2 *Salk.pl.*2,3, 4, 5, 11, 18, 34. See before, *Farewell* Eſquire v. *Chaffey et al'.* *Pa.* 54.

Here, the Jury have found for the Defendant. My Brother *Foſter*, who tried the Cauſe (which the Plaintiff has brought hither out of *Yorkſhire)* ſays, that "He thinks "*Half a Crown or leſs* would have been Damages ſufficient "IF *they had given their Verdict for the Plaintiff.*" He muſt pay the *Coſts*, before he *can* have a new Trial; Therefore I do not think that We ought to interfere, merely to give the Plaintiff an Opportunity of harraſſing the Defendant at a great Expence to Himſelf; where there has been *no Real* Damage, and where the Injury is ſo *trivial* as not to deſerve above a Half-Crown Compenſation. Beſides, the Plaintiff has brought the Action to be tried at a great Diſtance from the proper County. The Cauſe of Action is in the Nature of a *Crime:* The implied Damages are, in ſome Meaſure, by Way of *Puniſhment.* An Indictment or Information would lie. And in *criminal* Caſes, where the Defendant is acquitted, a New Trial cannot be granted.

Mr. Juſt. *Deniſon*, Mr. Juſt. *Foſter*, and Mr. Juſt. *Wilmot*, All ſpoke in very explicit Terms to the ſame Effect.

Per Cur. unanimouſly,
The Rule to ſhew Cauſe why there ſhould not be a new Trial was DISCHARGED.

Aſlin *verſ.* Parkin.

Saturday, 18th *November* 1758.

THIS was an Action of *Treſpaſs*, for the MESNE PROFITS of a Houſe in *Sheffield* in *Yorkſhire*, brought in the NAME of the *Leſſee* or NOMINAL *Plaintiff* in Ejectment, againſt the Tenant in Poſſeſſion, after Judgment obtained againſt the CASUAL EJECTOR, *by* DEFAULT. The *Coſts* of the Ejectment were alſo included and inſerted in the Declaration, *as Conſequential* Damages of the Treſpaſs therein complained of.

On the Trial of this Cauſe before Lord *Mansfield*, at the Summer Aſſizes 1758, at the City of *York*, the Plaintiff gave in Evidence, the Judgment in Ejectment, the Writ of

* P. 666. * of Poſſeſſion with the Return of Execution upon it, the Defendant's Occupation of the Premiſſes, the Value of them during that Time (which was proved to be 20 *l.*) and the Coſts of the Ejectment (amounting to 12 *l.* more.)

On the Part of the Defendant, it was *objected*, That as the Judgment in the Ejectment was *by Default*, againſt the CASUAL *Ejector*, this Action could *not* be legally maintained in the NAME of the *nominal* Plaintiff; but ought to have been brought by the Plaintiff's LESSOR: And they ought to have proved the Plaintiff to have been in *Poſſeſſion* when the Defendant committed the Treſpaſs for which the Action is brought.

In ſupport of this Objection, It was argued, that though the Law allows *fictitious* Proceedings in Ejectment, *for the trying* of TITLES; Yet in Actions *for* MESNE PROFITS, NO *ſuch Fiction* prevails: But the *Suit*, the *Injury*, and the *Defendant* are REAL; and the Action *in* NO *reſpect differs* from any *other* Action of Treſpaſs.

That this was a *Poſſeſſory* Action; which could in no Caſe be maintained, unleſs the *Plaintiff's* POSSESSION was either *proved* or *admitted:* And as, in the preſent Caſe, the Plaintiff *could not* POSSIBLY *prove* an *actual* Entry, there was NO *Evidence* of HIS *Poſſeſſion*, that could *affect*, or be *received againſt* the *preſent* Defendant.

It was *admitted*, that an Action of this Kind might be brought in the name of the nominal Plaintiff in Ejectment, where the *Tenant had appeared and confeſſed* Leaſe Entry and Ouſter; becauſe being thereby become a PARTY *to the Record* in Ejectment, and *having confeſſed* the Entry of the Plaintiff, He is ESTOPPED *by that Confeſſion and by the Judgment againſt him*, from controverting afterwards the Plaintiff's Poſſeſſion: But where the Judgment in Ejectment was by *Default*, *againſt the* CASUAL Ejector, there was NO *ſuch Confeſſion of the* TENANT, NO *Matter of Record to* ESTOPP *him*; but he was *equally at Liberty to deny* the Plaintiff's Poſſeſſion, and to put him upon *proving it*, as in *any other* Action of Treſpaſs; And having *never been a* PARTY *to the Judgment* in Ejectment, *neither* that Judgment nor the Writ of Poſſeſſion upon it, (as they were *merely between* the *nominal* Plaintiff and a *third* Perſon, the Caſual Ejector,) could be any Concluſion or Evidence *againſt* the *preſent* Defendant:

It was therefore inſiſted, that this Action *ought* to have been brought by the *Leſſor* of the Plaintiff, *in his* OWN *Name*; who might have proved an *actual* Entry under the Writ

* Writ of Poſſeſſion; and by that Entry, the Poſſeſſion he thereby obtained would *relate back* to the *Commencement* of his Title: But being brought in the Name of the *nominal* Plaintiff, and the Defendant being a *Stranger to the Judgment* in Ejectment, the Plaintiff had *failed* of maintaining his Action. * P. 667.

In Support of this Objection. The Defendant's Counſel urged That although the Diſtinction was carried no farther, in the Caſe of *Jefferies* v. *Dyſon* (2 *Strange* 960, *H.* 7 *G.* 2. *B. R.*) than to admit the Tenant in Poſſeſſion (where the Judgment was againſt the Caſual Ejector, by Default) to controvert the *Title* of the Plaintiff, upon an Action for the meſne Profits; Yet both Parts of that Caſe had been ſince contradicted; and it had been ſince holden "that the De-"fendant ſhould *not* controvert the Plaintiff's Title:" But (where the Tenant has not entered into the Common Rule) "the Plaintiff *muſt prove* his own *actual Poſſeſſion*; and can "only recover Damages from *that* Time." For this, they cited a Caſe of *Stanynought* v. *Couſins*, *H.* 19 *G.* 2. *C. B.* (2 *Barnes* 367.) and ſome Circuit-Traditions of Nonſuits for want of the Plaintiff's proving his Poſſeſſion, where the Judgment was by Default, againſt the Caſual Ejector.

Lord MANSFIELD *reſerved* the Point, at the Aſſizes; and afterwards propoſed it to *All* the Judges, and had their Opinion: Which He thought fit now publickly and particularly to *declare*.

UPON *Principles*, His Lordſhip ſaid, He was clearly of Opinion againſt the Objection, on the Trial, without hearing the Counſel for the Plaintiff. But, as *Authorities* were then referred to, and as the Point related to the *Effect* of *that Proceeding* which is *now* almoſt the *only* Remedy, in Practice, for recovering Land wrongfully with-held; He thought it of great Conſequence, that the Matter ſhould be conſidered by All the Judges. He therefore reſerved the Caſe, declaring "He did it with that View; and that He "would endeavour to get their Opinion without any Delay "or Expence to the Parties."

Accordingly, His Lordſhip, laid it before them upon the firſt Day of Term; And they took till laſt *Thurſday*, the 16th of *November*, to look into the Caſes, ſo far as they could, with any Accuracy, be traced. And beſides thoſe that are in print, They had ſeen ſome in Manuſcript, *different Ways*; which were now, He ſaid, totally immaterial to be mentioned

Becauſe All the Judges are unanimouſly of Opinion "That "the Nominal Plaintiff, and the Caſual Ejector, are judi-"cially

* P. 668. " * cially to be conſidered as the *fictitious Form* of an Action
" *really* brought by the *Leſſor* of the Plaintiff againſt the
* V. *poſt.* *pa.* 1295. " *Tenant in Poſſeſſion*; invented, * under the Control and
" Power of the Court, for the Advancement of Juſtice in
" many reſpects; and to force the Parties to go to Trial on
" the Merits, without being intangled in the Nicety of Plead-
" ings on either Side."

" That the *Leſſor of* the Plaintiff, and the *Tenant in Poſ-*
" *ſeſſion*, are, ſubſtantially, and in Truth *the Parties*, and
" the *only* Parties to the Suit. The Tenant in Poſſeſſion
" muſt be duly ſerved: And if He is not, He has a Right
" to ſet aſide the Judgment. If, after he is duly ſerved, He
" does not appear, but lets Judgment go by Default; ſuch
" Judgment is carried into Execution againſt him by a Writ
" of Poſſeſſion."

" That there is *no* Diſtinction between a Judgment in
" Ejectment upon a *Verdict*; and a Judgment by *Default*.
" In the firſt Caſe, the Right of the Plaintiff is tried and de-
" termined againſt the Defendant: In the laſt Caſe, It is
" *confeſſed*."

" An Action for the *meſne Profits* is *conſequential* to the
" Recovery in Ejectment. It may be brought by the Leſſor
" of the Plaintiff in his *own* Name, or in the Name of the
" *nominal Leſſee*; And in either Shape, it is equally *his*
" Action."

" The Tenant is *concluded* by the Judgment, and cannot
" controvert the *Title*. Conſequently, He cannot contro-
" vert the Plaintiff's *Poſſeſſion*: becauſe his Poſſeſſion is *Part*
" of his Title; For the Plaintiff, to intitle himſelf to reco-
" ver in an Ejectment, muſt ſhew a poſſeſſory Right not
" barred by the Statute of Limitations."

" This Judgment, like all others, only concludes the
" Parties, as to the *ſubject Matter* of it. Therefore, *beyond*
" the Time laid in the Demiſe, it proves Nothing at all:
" Becauſe, beyond that Time, the Plaintiff has alledged no
" Title, nor could be put to prove any."

" As to the *Length of Time the Tenant has occupied*, the
" Judgment proves nothing; nor as to the *Value*. And
" therefore, it was *proved* in this Caſe (and muſt be in all)
" *How long* the Defendant enjoyed the Premiſſes; and what
" the *Value* was: And it appeared that the Time of ſuch
" Occupation by the Defendant, was *within* the Time laid
" in the Demiſe."

This unanimous Reſolution of all the Judges, upon ſhort plain Principles, will not only be a certain and uniform Rule, upon Actions for meſne Profits; but may tend to put this

*this fictitious Remedy by Ejectment, upon a true and liberal Foundation; to attain ſpeedily and effectually the complete Ends of Juſtice, according to the real Merits of the Caſe. * P. 669.

My Brother WILMOT tells me, that he had the very ſame Queſtion made before Him, upon the *Oxford* Circuit, the laſt Aſſizes: But the Cauſe went off upon another Point.

I am therefore glad that the general Rule is now ſettled; and that the ſettling it, has occaſioned no Expence or Delay to the particular Parties in this Cauſe.

The RULE conſequently was, That the *Poſtea* be delivered to the PLAINTIFF, that He might have Judgment.

Heylyn and Others *verſus* Adamſon.

Monday, 20th *November* 1758.

THIS was an Action on the Caſe, upon Promiſes. And the firſt Count in the Declaration was upon an INLAND *Bill of Exchange*, *drawn* by *Robert Carrick* and directed to *William Dods*, dated the 13th Day of *March* 1756; Whereby the ſaid *Robert Carrick* required the ſaid *William Dods* to pay to the Defendant or his Order 100 *l.* at 40 Days after Date, Value received, as adviſed by the ſaid *Robert Carrick*: Which ſaid Bill was indorſed by the ſaid Defendant *(Eleanor Adamſon)* to the ſaid Plaintiffs, and was accepted by the ſaid *Dods*, but not paid by Him.

Upon the Trial of this Cauſe, before Lord *Mansfield*, at the Sittings after laſt *Hilary* Term at *Guildhall*, It was proved on the Part of the Plaintiffs, That the ſaid *Robert Carrick* made the Bill; And that the Defendant *indorſed it to the Plaintiffs*; and that the ſaid *William Dods accepted* it, but afterwards *refuſed Payment*; And that the Plaintiffs thereupon, on the Day it became payable, carried it to be *proteſted* for the *Non-payment*; and ſoon afterwards brought their Action thereon, againſt the Defendant: But it did not appear, on the Trial, that the DRAWER of the Bill had any *Notice* of ſuch Non-payment; or that any *Demand* of the Money was ever made on HIM before the Commencement of the Suit.

It was thereupon objected by the Defendant's Counſel, "That the Action would not lie againſt the Defendant "(the Indorſer,) UNTIL a *Demand* of Payment had been "made upon the DRAWER:" And as no ſuch Demand was proved to have been made on the Drawer the Plaintiffs ought therefore to be nonſuited.

* P. 670. * Lord MANSFIELD directed a Verdict to be given upon the ſaid firſt Count, for the Plaintiffs, for 100 *l.* Damages and 40 Shillings Coſts; ſubject to the Opinion of the Court, "Whether, upon this Caſe, the Plaintiffs were intitled to "recover?"

A Caſe was accordingly ſtated for the Opinion of the Court, and ſigned by Sir *Richard Lloyd* for the Plaintiffs, and by Mr. *Norton* for the Defendant.

The only Queſtion was, Whether in an Action brought upon an *Inland* Bill of Exchange, by the Indorſee againſt an *Indorſer*, This *Objection*, "That no Evidence was given at "the Trial, of *Notice* to the DRAWER of the Bill, or even "of making *any Inquiry* after *Him*" was a Ground of nonſuit.

It was argued on *Tueſday* laſt, (the 14th Inſtant,) by Mr. Serjeant *Davey* for the Plaintiff, and Mr. *Rooke* for the Defendant.

Serjeant *Davey* made a *Diſtinction* between *Inland* Bills of Exchange, and *Notes of Hand*. In the latter, the *Drawer* is to be the Payer: In the former, the *Drawee*, (the Acceptor of the Bill) is to pay it. So that upon a *Note* of Hand, the *Drawer* of the *Note* is the *firſt* Perſon to be reſorted to, for Payment: But upon an *Inland Bill of Exchange*, the *Acceptor* of the Bill, *not* the Drawer, is the *firſt* Perſon to be reſorted to, for Payment; (though the Drawer ſhall indeed ſtand as a collateral Security for his ſo doing:) Therefore Caſes upon promiſſory Notes are *not applicable* to Caſes on Inland Bills of Exchange. The Bill-holder can't come upon the Drawer of the *Bill*, till the Perſon upon whom it is drawn ſhall either refuſe to accept it, or refuſe Payment after he has once accepted it.

Every Indorſement of a Bill of Exchange is in the Nature of a *new Bill* of Exchange: And if there are ſeveral Indorſers, they All undertake "that the DRAWEE (the "Acceptor of the Bill,) ſhall pay it."

The Indorſee is a *Stranger to the* DRAWER of a Bill of Exchange: He is only concerned with the *Acceptor*.

A Bill of Exchange may happen not to be dated from any certain Place; or it may be dated from a Place where the Drawer does not reſide; as where a Traveller, calling at an Inn, takes up Money there, and gives a Bill which is afterwards indorſed by his Landlord.

And

* And it would be vaſtly inconvenient to all the Parties, if it ſhould be holden neceſſary for the Indorſee to find out or even ſearch for the *Drawer* of an Inland Bill of Exchange to give him Notice "that the Acceptor has refuſed Payment." For the Security may be loſt in the Interim, whilſt ſuch Search is making: The Indorſer may break, before the Indorſee may be able to find the Drawer. But the Indorſer may know where to find him, or how to apply to Him. * P. 671.

Six Chief Juſtices have been of different Opinions on this Point: Three of them, of one Opinion: Three, of another.

The 9 & 10 *W.* 3. *c.* 17. was the firſt Act that gives Proteſts for Non *Payment* of Inland Bills of Exchange: And the 3 & 4 *Ann. c.* 9. §. 4. 5. extends the Proteſt, to the Caſe of Non-*Acceptance*. The Words of both theſe Acts are remarkable; *viz.* "That the Proteſt ſhall be notified "to the Party FROM WHOM *the Bill was* RECEIVED; "*Who* ſhall repay the ſame with Intereſt and Charges."

The Inconvenience may be the ſame (as to this Matter) upon an *Inland* Bill, as upon a *foreign* Bill. Yet upon a *foreign* Bill, it certainly is not neceſſary. In 1 *Strange* 441. *Bromley* v. *Frazier*, *Tr.* 7 *G.* 1. on a *foreign* Bill of Exchange, The Court, on mature Deliberation held "That a De-"mand upon the Drawer is *not* neceſſary, to make a Charge "upon the Indorſer; but the Indorſee has Liberty to re-"ſort to *Either*." It was a Point then unſettled. In 1 *Salk.* 131, 133. there are, as it is ſaid in *Strange* 441. contradictory Opinions upon it; Which are profeſſedly ſettled by that Caſe of *Bromley* v. *Frazier*, as the Book declares: But thoſe contradictory Opinions are upon *Inland* Bills of Exchange. Indeed the Caſe of *Bromley* v. *Frazier* (then directly under Conſideration) was upon a *foreign* One: But the Book goes on thus, (Which is *general*, and equally applicable to *both* Sorts,)—'And as to the Notion that has 'prevailed, "that the Indorſer warrants *only* in Default of "the Drawer," there is *no Colour for it*: 'For every Indorſer is in the *Nature of a new Drawer*; and at *Niſi prius* the Indorſee is *never* put to *prove the Hand* of the *firſt* Drawer, where the Action is againſt an Indorſer. 'The Requiring a Proteſt for Non-Acceptance, is *not* becauſe a Proteſt amounts to a *Demand*: For it is no more 'than giving Notice to the Drawer, to get his Effects out 'of the Hands of the Drawee; who, by the Other's Drawing, is ſuppoſed to have ſufficient wherewith to ſatisfy the 'Bill.' So that this Notion is here exploded, "That the "Indorſer of a Bill of Exchange warrants *only in Default* "of the *Drawer*." But every Indorſer warrants againſt the Default of the *Payer*.

* P. 672. * In the Case of ‡ *Hamerton* v. *Mackrell*, *M.* 10 *G.* 2. *B. R.* (which was subsequent to the Case in 1 *Strange* 441.) in an Action by the Indorsee of a promissory Note against the Indorser, The Objection was that it was not alledged in the Declaration, "That a Demand was made upon the *Drawer* "of the Note." And it was there holden *not* necessary to be alledged in the *Declaration*. But Lord *Hardwicke* mentioned the Opinions of *Holt*, *Macclesfield*, *Pratt*, *Raymond*, *Eyre*, and *King*. *Holt*, *Eyre*, and * *Raymond* held it to be necessary: *Macclesfield*, *Pratt*, and *King* were of a contrary Opinion, *viz.* "that it was not necessary."

‡ The Serjeant called it *Richardson* v. *Mackerel*: But I took it by this Name of *Hamerton*.

*Lord Raymond first held the Opinion of *Macclesfield* and *Pratt*; but came over afterwards to that of *Holt* and *Eyre*; (as Lord *Hardwicke* said he had been informed.)

These Opinions seem to relate only to *Notes of Hand*: But upon a *Bill of Exchange*, the Indorsers are All only Promisers and Undertakers for the *Payer*, (the *Acceptor*,) of the Bill; and are not obliged to look after the Original Drawer. And Fact and Experience in Business are agreeable to this Position.

Mr. *Rooke*, for the Defendant, insisted that upon an Action brought by the Indorsee against an Indorser of an INLAND *Bill* of Exchange, the Plaintiff ought at the Trial, to *prove Notice to and Demand of Payment* from the DRAWER of the Bill.

The *Indorser* is only a *conditional* Undertaker for the DRAWER of the Bill, who is the first Contractor: He stands as a *Surety* only; and can not be called upon, *unless* the *Drawer makes Default*. It is like the Case of Principal and Accessary; where the Accessary cannot be tried before the Principal: So here, the Indorser cannot be liable, TILL the *Original* Contracter has failed in performing his Contract.

And great Inconvenience might follow, if this was otherwise.

There are several Authorities which fully prove that it is necessary. Cases in *B. R. Temp. W.* 3, 244. *Lambert* v. *Oakes*, at *Guildhall*: and 1 *Ld. Raym.* 443, *Lambert* v. *Oakes*, S. C. is directly in Point. 1 *Salk.* 126. *pl.* 6. *Anon.* († probably S. C.) accordingly. 1 *Strange* 649. *M.* 12 *G.* 1. *Sydderbottom* v. *Smith*. Upon an Action against the Indorser of a Promissory Note, at *Guildhall*, *C. B.* Ld. Ch. Just. *Eyre*'s Opinion was, accordingly, "That the Plaintiff "*must prove* Diligence to get the Money of the Drawer; "the Indorser *only* warranting on *his Default*." And for want of such Proof, he directed the Jury to find for the Defendant,

† *Lambert* v. *Pask*, 1 *Salk.* 127. *pl.* 9. seems clearly S. C. Indeed they are, All Four, probably, the same Case; though two of them are placed under *M.* 10. And the other two under *P.* 11 *W.* 3.

* fendant. 2 *Strauge* 1087. *Collins* v. *Butler*, at *Guildhall*, *per Lee*, Ch. Juſt. It was ruled accordingly; who cited a Caſe determined on great Debate, in *C. B.* in *P.* 4 *G.* 2.— *Due Diligence* muſt be ſhewn to have been uſed in inquiring after the Drawer of the Bill of Exchange, *before* the Money can be recovered againſt the Indorſer. * P. 673.

And there is NO *Difference* between a *Note* of Hand, and a *Bill* of Exchange; other than that the Drawer of the Note is the *expreſs* Promiſer, and (as it were) *both* Drawer and Drawee; Whereas on a *Bill* of Exchange, he is only an *implied* Promiſer. Indeed on a *foreign* Bill of Exchange this Notice and Demand is not neceſſary; becauſe the *foreign* Drawer is *not amenable* to Juſtice *here*.

As to the Words of the Statutes of 9, 10 *W.* 3. & 3, 4 *Ann.* they do *not exclude* the Neceſſity of giving Notice to the Drawer: Though they add an *additional* Caution, "of "giving Notice to the Perſon from whom the Bill was "received."

Mr. *Serjeant*'s Caſe, wherein Mention is made of the Six Chief Juſtices differing in Opinion, ſeems to be taken from the 3d Volume of the *Abridgment of the Law* *.

* See *New Abridgment*, Vol. 3. Title, *Merchant* and *Merchandiſe*, *Pa.* 608. Note b. (which is undoubtedly the *ſame* Caſe cited by the Serjeant.)

Serjeant *Dawey*, in Reply—I agree that the Drawer of a Bill of Exchange is only a *Conditional* Undertaker for the *Drawee*: And ſo alſo is the Indorſer of a Bill of Exchange a Conditional Undertaker for the *Drawee*. But it does not follow that the Indorſer of a Bill of Exchange is only a Conditional Undertaker for the *Drawer*.

The Caſe of *Lambert* v. *Oakes* was upon a *Note of Hand* (according to Ld. *Raymond*:) And Ld. Ch. J. *Holt*'s Opinion upon a *Bill of Exchange*, was upon a Caſe not before him.

In the Caſe of *Hamerton* v. *Mackrell*, Ld. *Hardwicke*† held it *not* neceſſary. † The Serjeant had been miſinformed: For Lord *Hardwicke* (as appears by *my* Note of that Caſe) did not give or even intimate his own Opinion upon that Point.

The *Drawee*'s Place of Abode is always known, upon a Bill of Exchange; but not the *Drawer*'s.

The COURT gave no Opinion at the Time of this Argument; but poſtponed it, in Order to ſettle the Point with Preciſion and Certainty.

Lord

* P. 674. * Lord MANSFIELD obſerved, That the Confuſion ſeemed to have ariſen from its not being ſettled, "WHO is "the *Original Debtor*."

Mr. Juſt. DENISON ſaid, The Caſe of *Hamerton* v. *Mackrell* was upon a Writ of Error; and the Judgment was affirmed, upon the Allegation contained in the Declaration, of a PROMISE *made by the Indorſer*, which (upon a Writ of Error,) they conſidered as an *expreſs* Promiſe: But Lord *Hardwicke* did *not* give his *own* Opinion at all, upon what is now the preſent Queſtion.

CUR. ADVIS'.

Lord MANSFIELD now delivered the Reſolution of the Court.

His Lordſhip ſaid, He could not perſuade himſelf that there had really been ſuch a Variety of Opinions upon this Queſtion, at *Niſi prius*, as had been mentioned at the Bar. But however that may be, It muſt now be determined upon the Nature of the Tranſaction, General Convenience, and the Authority of deliberate Reſolutions *in Court*.

A *Bill of Exchange* is an Order, or Command, to the Drawee who has, or is ſuppoſed to have Effects of the Drawer in his Hands, to *pay*. When the Drawee has accepted, *He* is the *Original Debtor*; and due Diligence muſt be uſed in applying to *him*. The Drawer is only liable in *Default* of Payment by *him*, due Diligence having been uſed: And therefore if the Acceptor is not called upon, within a reaſonable Time after the Bill is payable, and happens to break, the Drawer is not liable at all.

Every Man therefore who takes a Bill of Exchange, muſt know where to call upon the Drawee; and undertakes to demand the Money of *Him*.

When that Bill of Exchange is *indorſed*, by the Perſon to whom it was made payable; *as between the Indorſer and Indorſee*, it is a *new* Bill of Exchange; and the Indorſer ſtands in the *Place of the Drawer*: The *Indorſee* undertakes to demand the Money of the *Drawee*. If He neglects, and the Drawee becomes inſolvent, the Loſs falls upon himſelf. If the Indorſee is diligent, and the Drawee refuſes Payment; his *immediate Remedy* is againſt the *Indorſer*: And it was very properly obſerved, * that the Act of 9, 10 *W.* 3. requires Notice of the Proteſt to be given "to the Perſon *from* "*whom*

* V. *ante*, *fa.* 671.

" * *whom the Bill was received.*" He may have *another* Remedy againſt the *firſt* Drawer; as Aſſignee to, and ſtanding in the Place of the Indorſer. * P. 675.

The Indorſee does not truſt to the Credit of the Original Drawer: He does not know whether ſuch a Perſon exiſts, or where he lives, or whether his Name may have been forged. The Indorſer is *his* Drawer; and the Perſon to whom he originally truſted, in Caſe the Drawee ſhould not pay the Money. There is no Difference in this reſpect, between *foreign* and *Inland* Bills of Exchange, except as to the Degree of Inconvenience: All the Arguments from Law, and the Nature of the Tranſaction, are exactly the ſame in both Caſes.

As to *foreign* Bills of Exchange, the Queſtion was ſolemnly determined by this Court, upon very ſatisfactory Grounds, in the Caſe of * *Bromley* v. *Frazier*—That was ' An Action upon the *Caſe* upon a *foreign* Bill of Exchange, ' by the Indorſee againſt the Indorſer:' and on General Demurrer, it was objected, " that they had *not ſhewn a* " *Demand upon the Drawer*, in whoſe Default only it is " that the Indorſer warrants." And becauſe ' this was a ' Point unſettled, and on which there are contradictory ' Opinions in *Salkeld* 131 & 133. the Court took Time to ' conſider of it. And on the ſecond Argument, They de- " livered their Opinions, That the Declaration was well " enough: For the Deſign of the Law of Merchants in " diſtinguiſhing theſe from all other Contracts, by making " them aſſignable, was for the Convenience of Commerce, " that they might paſs from Hand to Hand in the Way " of Trade, in the ſame Manner as if they were Specie. " Now to require a Demand upon the Drawer, will be " laying ſuch a Clog upon theſe Bills, as will deter every " Body from taking them. The Drawer lives abroad, per- " haps in the *Indies*, where the Indorſee has no Correſpon- " dent to whom He can ſend the Bill for a Demand; or " if he could, yet the Delay would be ſo great that no " Body would meddle with them. Suppoſe it was the " Caſe of ſeveral Indorſements, muſt the laſt Indorſee tra- " vel round the World, before he can fix his Action upon " the Man from whom he received the Bill? In common " Experience, every Body knows that the more Indorſe- " ments a Bill has, the greater Credit it bears: Whereas if " thoſe Demands were all neceſſary to be made, it muſt " naturally diminiſh the Value, by how much the more dif- " ficult it renders the Calling in the Money. And as to " the Notion that has prevailed, that the Indorſer warrants " *only in Default of the Drawer*, there is no Colour for it: " For every Indorſer is in the Nature of a *new* Drawer; " And at *Niſi prius*, the Indorſee is never put to prove the " *Hand* of the *firſt* Drawer, where the Action is againſt " an * 1 *Strange* 441: *Tr.* 7. *G.* 1. *B. R.*

* P. 676. " an Indorſer. The requiring a *Proteſt* for Non-accept-
" * ance, is not becauſe a Proteſt amounts to a *Demand:*
" For, it is no more than a giving Notice to the Drawer to
" get his Effects out of the Hands of the Drawee, who,
" (by the Other's Drawing,) is ſuppoſed to have ſufficient
" wherewith to ſatisfy the Bill."

" Upon the whole, They declared themſelves to be of
" Opinion, That in the Caſe of a *foreign* Bill of Exchange,
" a Demand upon the Drawer is *not* neceſſary, to make a
" Charge upon the Indorſer; but the Indorſee has his Li-
" berty to reſort to *Either*, for the Money: Conſequently,
" the Plaintiff (they ſaid), muſt have Judgment."

EVERY Inconvenience *here ſuggeſted* holds to a *great Degree*, and *every other* Argument holds *equally*, in the Caſe of INLAND Bills of Exchange.

WE are therefore All of Opinion, " That to intitle the
" Indorſee of an INLAND Bill of Exchange to bring an
" Action againſt the Indorſer, upon Failure of Payment by
" the Drawee, it is *not* neceſſary to make any Demand of,
" or Inquiry after, the firſt *Drawer*."

The Law is exactly the ſame, and fully ſettled, upon the Analogy of *Promiſſory Notes* to Bills of Exchange; which is very clear, when the *Point of Reſemblance* is once fixed.

WHILE a Promiſſory Note continues in its *original* Shape of a Promiſe from One Man to pay to another, it bears *no* Similitude to a Bill of Exchange. *When* it is *indorſed*, the *Reſemblance* BEGINS: For *then*, it is an *Order*, by the Indorſer, *upon* the *Maker* of the Note, (*his Debtor*, by the Note,) *to pay to the Indorſee*. This is the very Definition of a Bill of Exchange.

The Indorſer is the Drawer; the Maker of the Note is the Acceptor; and the Indorſee is the Perſon to whom it is made payable. The Indorſer only undertakes, *in Caſe* the Maker of the Note does not pay. The Indorſee is bound to *apply to the Maker* of the Note: He takes it upon *that Condition*; and therefore muſt, in all Caſes, know who he is, and where he lives: And if, after the Note becomes payable, He is guilty of a Neglect, and the Maker becomes inſolvent, He loſes the Money and cannot come upon the Indorſer at all.

Therefore, before the *Indorſee of a Promiſſory Note*, brings an Action againſt the *Indorſer*, He muſt ſhew a Demand, or due Diligence to get the Money from the *Maker* of the Note;—juſt as the Perſon to whom the Bill of Exchange is made payable muſt ſhew a Demand,

* Demand, or due Diligence to get the Money from the *Acceptor*, before he brings an Action againſt the *Drawer*. This was determined by the whole Court of Common Pleas, upon great Conſideration, in *Paſch.* 4. *G.* 2; as cited by my Ld. Ch. J. *Lee* in the Caſe of * *Collins* v. *Butler*. * P. 677.

* 2 *Strange* 1087. 11 *G.* 2.

So that the Rule is exactly the *ſame* upon Promiſſory *Notes*, as it is upon *Bills* of Exchange; and the Confuſion has, in part, ariſen from the *Maker* of a Promiſſory Note being called the *Drawer:* Whereas, by Compariſon to Bills of Exchange, the *Indorſer* is the *Drawer*.

All the Authorities, and particularly Ld. *Hardwicke*, in the Caſe of *Hamerton* v. *Mackrell*, *M.* 10 *G.* 2. (according to my Brother *Deniſon*'s State of what his Lordſhip ſaid,) put *Promiſſory Notes* and *Inland Bills of Exchange* juſt upon the † *ſame* Footing: And the ‡ Statute expreſsly refers to Inland Bills of Exchange.

† My *own* Note of that Caſe is exactly agreeable; *viz.* "Promiſſory Notes ſeem to me to be put upon the *ſame* Foot as Inland Bills of Exchange. ‡ *V.* 3. 4 *Ann. c.* 9.

But the ſame Law muſt be applied to the ſame Reaſon; to the *Subſtantial Reſemblance* between Promiſſory Notes, and Bills of Exchange; and not to the ſame *Sound*, which is equally uſed to deſcribe the Maker of both.

My Ld. Ch. J. *Holt* is quoted as being of Opinion, "that "in Actions upon Bills of Exchange, it is neceſſary to prove "a Demand upon the Drawer." For Proof of this, the principal Caſe referred to, is that of *Lambert* v. *Oakes*, reported in three Books: 1 *Ld. Raymond*, 1 *Salk.* and 12 *Mod.*

In 1 *Ld. Raym.* 443, It appears manifeſtly, that the Queſtion aroſe upon a *Promiſſory Note*. "*R.* ſigned a NOTE under his "Hand, payable to *Oakes*, or his Order; *Oakes* indorſed it to "*Lambert*; upon which, *Lambert* brought the Action for the "Money againſt *Oakes*. *Per Holt*, Ch. J. He ought to prove "that he had demanded or done his Endeavour to demand "this Money of *R*, before he can ſue *Oakes* upon the In-"dorſement. The *ſame Law*, if the *Bill* was drawn upon "any *other* Perſon, payable to *Oakes* or Order." That is, "A Demand muſt be made of the Perſon UPON WHOM "the Bill is drawn." And other Parts of the Caſe manifeſtly ſhew *this* to having been the *Meaning*. For my Ld. Ch. J. *Holt* is reported to have ſaid, "The Indorſement "will ſubject the Indorſer to an Action; becauſe it makes a "new Contract, *in Caſe the Perſon* UPON WHOM *it is* "*drawn does not pay it.*" § Again, "if the Indorſee does § In *pa.* 444. "not demand the Money payable by the Bill, *of the Perſon*

"UPON

*P. 678. "UPON WHOM *it is drawn, in convenient Time, and "afterwards he fails*, the Indorſer is *not* liable."

*1 *Salk.* 127. (therecalled *Lambert* v. *Pack*,) *pl.* 9.

In * *Salkeld*, the Caſe is confounded: It is ſtated to be a *Bill of Exchange*, and "that the Demand muſt be made "upon the *Drawer*, *or him* upon whom it was drawn." My Ld. Ch. J. *Holt* had ſaid that a Demand muſt be made of the *Maker* of a Promiſſory Note, (calling him the *Drawer*;) And in the Caſe of a Bill of Exchange, of *him* upon whom the Bill is *drawn*. The Report jumbles both together, as applied *only* to a Bill of Exchange; miſled, I dare ſay, by the Equivocal Sound of the Term *Drawer*, and by the Chief Juſtice's Reaſoning in the Caſe of a Promiſſory Note, from the Law upon Bills of Exchange. †

†Note. The Report in 1 *Salk.* 126. *pl.* 6. is much more ſtrong and explicit: But it is ſhort, anonymous, and a mere looſe Scrap, by the ſame Reporter; who was manifeſtly unclear about the Caſe, (being S. C. with *pl.* 9.)

In 12th *Modern* 244. The Caſe is miſtaken too; and ſtated as upon a *Bill of Exchange*, and as a Determination "that there muſt be a Demand upon the *Drawer of the* "*Bill of Exchange*:" And yet the Report itſelf ſhews demonſtrably, that what was ſaid by my Ld. Ch. J. *Holt* was applied to the Maker of a *Promiſſory Note*, (calling him the *Drawer.)* For the Report makes Him argue—"So, *if* "the Bill was drawn on any *other* Perſon, payable to *Oakes* "or Order:" Which ſhews that the Caſe in Judgment was *not* a Bill drawn upon *another* Perſon, but payable only to *Oakes, by R.* HIMSELF.

It ſeems to Me, as if Ld. Ch. J. *Holt*, in that Caſe, had conſidered the *Drawee of a Bill* of Exchange in the ſame Light as the *Maker of a Promiſſory Note*: But looſe and haſty Notes, miſled by Identity of Sound, have miſapplied what was ſaid of the Drawer of a *Promiſſory Note*, to the Drawer of a *Bill of Exchange*; and to ſuch a Degree miſapplied it, that two Reports out of the ‖ three have ſtated the Queſtion as *ariſing* upon a Bill of Exchange; which is manifeſtly otherwiſe.

‖ There ſeem to be *four* Reports of S.C. or at leaſt of S.P. (*V.* Note on *pa.* 672. and on this *pa.* 678.)

But be this Conjecture as it may, We are All of Opinion "That in Actions upon *Inland Bills of Exchange*, by an "Indorſee againſt an Indorſer, the Plaintiff *muſt prove* a "Demand of, or due Diligence to get the Money from, "the *Drawee* (or ACCEPTOR;) but need *not prove* any "Demand of the DRAWER: And that in Actions upon "*Promiſſory Notes*, by an Indorſee againſt the Indorſer, the "Plaintiff muſt prove a Demand of, or due Diligence to "get the Money from the MAKER of the Note."

Accordingly, the RULE was, That the *Poſtea* be delivered to the PLAINTIFF.

Rex

* Rex *verſ.* Mallinſon.

* P. 679.

Wedneſday 22d November 1758.

THIS was upon a Conviction for killing ten Trouts.

The Conviction ſets forth, that One *John Keep*, of &c. came before the Juſtice of Peace, and gave Information that the Defendant *Thomas Mallinſon*, of &c. Taylor; *not having any Lands* and Tenements or other Eſtate of *Inheritance* in his own Right nor in the Right of his Wife, of the clear yearly Value of 100 *l.* or for Term of Life; *nor having any Leaſe or Leaſes* of 99 Years or for any longer Term, of the clear yearly Value of 150 *l*; *nor being the Son and Heir* apparent of an Eſquire or other Perſon of higher Degree; *nor being Owner or Keeper* of any Foreſt Park Chaſe or Warren being ſtocked with Deer or Conies, for his own neceſſary Uſe, in reſpect of ſuch Foreſt Park Chaſe or Warren: *nor being Lord of any Manor* or Royalty, *nor Game-keeper* of any Lord or Lady of any Lordſhip or Manor, duly made conſtituted or appointed, with Power or Authority to take kill or deſtroy the Game in or upon any ſuch Lordſhip or Manor; *nor being a Maker or Seller* of any Nets Angles Leaps Piches or other Engines for the taking of Fiſh; NOR BEING OWNER *of any River or Fiſhery*; *nor being a Fiſherman* lawfully authorized to fiſh with Nets in navigable Rivers or Waters *nor an Apprentice* to any ſuch Fiſherman; *nor in* ANY WISE WHATSOEVER *impowered authorized or qualified* by the Laws of this Realm, either to take kill or deſtroy any Sort of Fiſh Fowl or other Game whatſoever, *either for himſelf or for any other* Perſon or Perſons whomſoever, nor to keep or uſe any Greyhound Setting-Dog Hays Lurchers Tunnels Nets or any other Engine to kill and deſtroy the Game; on the 27th of *June* 31 *G.* 2. at *Golcarr* aforeſaid within the ſaid Riding, Did, *with* a certain *Net* UNLAWFULLY *take and kill ten Fiſh*, that is to ſay *ten Trouts, contrary to the Form of the Statute* in ſuch Caſe made and provided. *Whereupon* the ſaid *Thomas Mallinſon*, afterwards, on the ſaid 27th Day of *June* in the Year aforeſaid, had Notice of the ſaid Information and of the Offence therein charged upon him as aforeſaid; and was then and there in due Manner ſummoned to be and appear before the ſaid Juſtice at his Dwelling-houſe in *M.* aforeſaid in the ſaid Weſt-Riding IMMEDIATELY *upon his* Receipt of that Summons, to make his Defence againſt the ſaid Charge contained in the ſaid Information: But the ſaid *Thomas Mallinſon neglecteth to appear*, and doth not appear before the ſaid Juſtice, nor make any Defence againſt the ſaid Charge; but *maketh Default* therein. Wherefore the ſaid Juſtice, afterwards, that is to ſay on the 12th Day of *July* 31 *G.* 2. at his above-mentioned Dwelling-houſe in *M.* aforeſaid in the ſaid Weſt-Riding, (the ſaid *Thomas Mallinſon*

* P. 680. *Mallinſon having* ſo *been ſummoned*, and having hitherto *neglected to appear or make any Defence* againſt the ſaid Charge,) doth proceed to examine the Truth of the Charge aforeſaid in the ſaid Information contained. And hereupon *John Whitely* of *Golcarr* aforeſaid Cordwainer, being a credible Witneſs, cometh before the ſaid Juſtice in his proper Perſon, and before the ſaid Juſtice upon his Corporal Oath upon the Holy Evangeliſts of God to him then and there adminiſtered by the ſaid Juſtice, depoſeth ſweareth and upon his ſaid Oath affirmeth and ſaith That the ſaid *Thomas Mallinſon*, not having any Lands and Tenements or other Eſtate of Inheritance in his own Right nor in the Right of his Wife, of the clear yearly Value of 100 *l*, or for Term of Life; nor having any Leaſe or Leaſes of 99 Years or for any longer Term, of the clear yearly Value of 150 *l*; nor being the Son and Heir apparent of an Eſquire, or other Perſon of higher Degree; nor being Owner or Keeper of any Foreſt Park Chaſe or Warren being ſtocked with Deer or Conies for his own neceſſary Uſe in reſpect of ſuch Foreſt Park Chaſe or Warren; nor being Lord of any Manor or Royalty, nor Game-keeper of any Lord or Lady of any Lordſhip or Manor, duly made conſtituted or appointed with Power or Authority to take kill or deſtroy the Game in or upon any ſuch Lordſhip or Manor; nor being a Maker or Seller of any Nets Angles Leaps, Piches or other Engines for the taking of Fiſh; *nor being Owner or Occupier of any River or Fiſhery*; nor being a Fiſherman lawfully authorized to fiſh with Nets and Engines in navigable Rivers or Waters; nor an Apprentice to any ſuch Fiſherman; *nor in* ANY WISE WHATSOEVER *impowered authorized or qualified by the Laws of this Realm, either to take kill or deſtroy* any Sort of Fiſh Fowl or other Game whatſoever, *either for himſelf or for any other* Perſon or Perſons whatſoever, nor to keep or uſe any Greyhound Setting-Dog Hayes Lurchers Tunnels Nets or any other Engine to kill and deſtroy the Game; on the 27th Day of *June* in the 31ſt Year aforeſaid, in *Golcarr* aforeſaid in the ſaid Riding, did, with a certain Net, *unlawfully* take and kill ten Fiſh, that is to ſay, ten Trouts, contrary to the Form of the Statute in ſuch Caſe made and provided. And thereupon the ſaid *Thomas Mallinſon*, on the 12th Day of *July* aforeſaid in the Year aforeſaid, *is duly convicted* before the ſaid Juſtice, of the *Offence aforeſaid* in the ſaid Information contained and therein charged upon him, by the Oath of one credible Witneſs, the aforeſaid *John Whitely*, according to the Form of the Statute in ſuch Caſe made and provided. It is therefore adjudged by the ſaid Juſtice, That the ſaid *Thomas Mallinſon* is guilty of the *Offence aforeſaid* in the ſaid Information contained; and is hereby convicted thereof, according to the Form of the Statute in ſuch Caſe made and provided; *And* that the ſaid *Thomas Mallinſon* hath

forfeited

forfeited the Sum of Five Pounds for his *Offences aforeſaid*; * P. 681.
that is to ſay Ten Shillings a piece for every and each of
* the abovementioned Fiſh ſo taken and killed by the ſaid *Thomas Mallinſon* as aforeſaid, amounting together to the Sum of 5 *l*, to be levied and diſtributed according to the Form of the Statute in ſuch Caſe made and provided. *In Witneſs, &c.*

Mr. *Norton*, on Behalf of the Defendant, made ſeveral Objections to this Conviction.

1ſt. The *Summons* is *bad*, as ſet out; (though indeed it was not neceſſary to have ſet it out at all.) It is "to appear "IMMEDIATELY;" which is *not* a *reaſonable* Summons. 1 *Strange* 261. *Rex* v. *Johnſon*. An Objection of this Sort was taken to a Summons "to appear on the *ſame Day*." It received indeed a ſatisfactory Anſwer, from a Fact; *viz.* the Defendant's having there actually *appeared* to it, and made a Defence: Which Appearance and Defence *cured* all Defects in the Summons.

2d Objection. Here is *not a full negative* Adjudication of the Defendant's WANT *of Qualification:* For it is *not* ſtated "That the Defendant *had not the Licence or* CON-"SENT *of the Owner.*" And as this eſſential Circumſtance is omitted, the *General* Allegation, of his "taking and "killing the Fiſh *unlawfully and againſt the Statute*," is not ſufficient. *V. ante Pa.* 154, 155. *Rex* v. *Jarvis*, *H.* 30. *G.* 2.

3d Objection. It might be his *own* Fiſh and in his *own* Pond, for Aught that appears to the contrary: For it is only alledged "That he killed ten Trouts *at* ſuch a Place."

The Conviction ſeems to be intended upon * 4, 5 *W.* 3. *c.* 23. §. 3. * It ſeems clearly to have been intended to be grounded on 22, 23 *C.* 2. *c.* 25. §. 7: and not upon 4, 5 *W.* & *M.*

Mr. *Yates contra*, for the Proſecutor.

1ſt. *No preciſe* Time of Appearance is requiſite to be fixed by the Summons: And *this* give a larger Latitude, than if a Day and Hour had been fixed; for it means only, "*as ſoon as he can.*"

2dly. Though this Omiſſion of his, "not having the Con-"ſent of the Owner", cannot be ſupported upon the Statute of 22, 23 *C* 2. *c.* 25. §. 7; Yet it may, upon that of 4, 5 *W.* & *M. c.* 23: which ſays only—"If any Perſon *not qualified* by the Laws of this Land." (*V.* §. 3.) And the Court will *not preſume* a Qualification. As in a Conviction upon the Gin-Act, in the Caſe of *Rex* v. *Brian*, 2. *Strange*

* P. 682. * *Strange* 1101, The Court would not preſume that the Gin was ſold *to be uſed in Medicine*. *Rex* v. *Theed*, *M.* 11 *G.* 1. in 2 *Lord Raym.* 1375, and in 1 *Strange* 608, The Conviction was preſumed to be *right*; as it did *not appear to be wrong*.

3dly. The ſame Anſwer holds to this Objection; *viz.* "That the Court will *not preſume* that the Fiſh were the "Defendant's *own*," or "That he killed them in his *own* "Pond."

Lord MANSFIELD—This Conviction is clearly bad.

The Offence provided againſt by the Act of 22, 23 *C.* 2. *c.* 25. is *Stealing* Fiſh; Taking it *without* the Licence or Conſent of the Owner. The Juriſdiction given to the Juſtice of Peace is over every *ſuch* Offender or Offenders in *ſtealing* taking or killing Fiſh: *(V.* §. 7 *)* Taking and Killing, in the Intention of this Statute, mean STEALING. But this Man is not convicted of ANY Offence. For he is not charged with *Stealing*, nor even with taking and killing the Fiſh *of* ANOTHER *Perſon*, or in ANOTHER *Perſon's Pond*. The Offence ſpecified in the Statute is Taking it "without the Licence or Conſent of the Lord or Owner "of the Water." But it may be his *own* Pond, and his *own* Fiſh, for any Thing that appears to the contrary, in the preſent Caſe.

Therefore, *if* there was no *other* Fault in it, it is eſſentially bad for *this Reaſon alone*.

Mr. Juſt. DENISON—It is *full of Faults*: But *this alone* would be fatal. It does not appear that the Fiſh he killed, were not his *own*, or killed in his *own* Ponds.

Mr. Juſt. FOSTER—The Offence intended by the Act is the *Invading* ANOTHER *Man's Property*. But there is *no ſuch* Charge here upon this Man, as invading the Property of *Another*.

Mr. Juſt. WILMOT.—This Conviction is bad, for the *Faults that have been mentioned*, and for a *great many others*: It is bad *throughout*.

Per. Cur. unanimouſly,
CONVICTION QUASHED.

Goſs

*Goſs and Another *verſ.* Withers. * P. 683.
Iidem *verſ.* Eundem.

THIS was a ſpecial Caſe, from the Sittings in *London*, upon two Actions, on two diſtinct Policies of Inſurance; one, upon a Ship; and the other, upon the Loading.

The former was an Inſurance upon the *David and Rebeccah*, at and from *Newfoundland* to her Port of Diſcharge in *Portugal* or *Spain*, without the *Streights*, or *England*; to commence from the time of her beginning to load at *Newfoundland*, for either of the abovenamed Places: And it was upon the *Body*, Tackle, Apparel, Ordnance &c, &c, of the *Ship*; beginning the Adventure at *Newfoundland*; and to continue during her Abode there, and until the ſaid Ship, with all her Ordnance, Tackle &c, ſhould be arrived at her Port of Diſcharge as aforeſaid, and until ſhe ſhould have been moored at Anchor 24 Hours in Safety. It was to be lawful for the Ship to touch at and ſtay in any Port whatſoever, without Prejudice to the Inſurance. The Ship was, by Agreement, to be valued at the Sum ſubſcribed, without further Account. And in Caſe of Loſs or Misfortune, it was to be lawful for the Aſſured, their Servants &c. to ſue labour and travel, for in or about the Defence Safeguard and Recovery of the Ship, or any Part thereof, without Prejudice to the Inſurance: To the Charges whereof the Inſurers were to contribute, *pro Rata*. The Inſurance was to be at 10 Guineas *per Cent*: And in Caſe of Loſs, to abate 2 *l. per Cent.* and in Caſe of Average-Loſs not exceeding 5 *l. per Cent.* to allow Nothing towards ſuch Loſs. And if the Veſſel diſcharged *without* the *Streights*, excepting the Bay of *Biſcay*, 2 Guineas *per Cent.* was to be returned: And if ſhe ſailed with Convoy, and arrived, 2 Guineas more *per Cent.* was to be returned. The Plaintiffs declared upon a *total* Loſs, by Capture by the *French*.

The Policy declared upon, in the other Action, was an Inſurance upon any kind of lawful *Goods* and *Merchandizes*, loaden or to be loaden on board the aforeſaid Ship: Which, for 7 *l.* 7 *s.* inſured 70 *l.* And the Declaration alledged that divers Quantities of Fiſh and other lawful Merchandizes to the Value of the Money inſured were put on board, to be carried from *Newfoundland* to her Port of Deſtination, and ſo continued, (except ſuch as were thrown overboard as is aforementioned,) till the Loſs of the Ship and Goods. The Declaration then avers that $\frac{1}{4}$ of the ſaid Goods were neceſſarily thrown overboard, in a Storm, to preſerve the Ship and the Reſt of the Cargo: After which *Jetſon*, the Ship and the Remainder of the Goods were taken by the *French*.

There

* P. 684. * There was another Count in this Declaration, for Money had and received to the Uſe of the Plaintiffs.

The Caſe ſtates That the Ship departed from her proper Port; and was *taken* by the *French* on the *23d of December* 1756; And that the *Maſter Mates* and *all the Sailors*, *except* an Apprentice and Landman, were *taken out and carried to France.* That the Ship remained in the HANDS OF THE ENEMY 8 *Days*; and was *then retaken* by a *Britiſh* Privateer, and brought in on the *18th of January* to *Milford-Haven*: And that *immediate Notice* was given by the Aſſured to the Aſſurers, with *an Offer to* ABANDON the Ship to their Care. It was alſo proved at the Trial, That before the Taking by the Enemy, a violent Storm aroſe at Sea; which firſt ſeparated the Ship from her Convoy, and afterwards *diſabled Her ſo far* as to render Her incapable of proceeding on Her deſtined Voyage, without going into Port to refit.

It was alſo proved, That part of the *Cargo* was thrown overboard in the Storm; and the Reſt of it was *ſpoiled* whilſt the Ship lay at *Milford-Haven*, *after* the Offer to abandon, and before She could be refitted. And the Aſſured proved their Intereſt in the Ship and Cargo, to the Value inſured.

Several Queſtions ariſing upon the Trial of the firſt of the ſaid Cauſes, It was agreed that the Jury ſhould bring in their Verdict, in both Cauſes, for the Plaintiffs, as for a *total* Loſs; Subject, however to the Opinion of the Court on the following Queſtions, *viz.*

1ſt. Whether *this Capture* of the Ship by the Enemy, was or was not SUCH a Loſs as that the Inſurers became *liable* thereby:

2dly. Whether under the ſeveral Circumſtances of this Caſe, the Aſſured had or had not a RIGHT TO ABANDON *the Ship to the Inſurers*, *after* She was carried into *Milford-Haven.*

This Caſe was twice argued; *viz.* firſt, on *Tueſday* 6th *June* 1758, by Mr. *Morton pro Quer'*, and Mr. Serjeant *Davy pro Def'*; And again, on *Friday* 10th *November* 1758, by Mr. *Norton pro Quer'*, and Sir *Richard Lloyd pro Def'*.

Mr. *Morton* and Mr. *Norton*, on Behalf of the Plaintiffs, argued for the Affirmative, in both Queſtions.

They previouſly diſtinguiſhed between Caſes diſputed *between Inſurers and Inſured*, and thoſe *between Owners and Recaptors*; and obſerved that *This* is a mere Contract between the *Parties.*

Firſt

* Firſt Point—This is ſuch a *total Loſs*, as renders the Inſurers liable to anſwer for it. * P. 685. Firſt Point.

They ſaid they would conſider (1ſt) *What* an *Inſurance is*; and (2dly.) *What* a *Capture by an Enemy*, is.

1ſt. The *Definition of an Inſurance* is in *Bynkerſhoek's Quæſtiones publici Juris, Lib.* 1. *cap.* 21.

2dly. A *Capture* is, when there is *no juſt Ground of Hope of recovering* the Ship: *Then* it becomes the Property of the Captor. *Grotius L.* 3. *c.* 6. *pa.* 814. *De jure belli & pacis.* "*Tunc enim deſperari incipit Recuperatio &c.*"

And the Period of *Time of the Detention* is another Rule; *viz.* being 24 *Hours in Poteſtate hoſtium.* Indeed ſubſequent Writers do not fix it ſo preciſely: But they are then treating only upon * *Salvage*. *Bynkerſhoek*, indeed, differs in the *Premiſſes*, *Lib.* 1. *c.* 4. *Quæſtiones juris publici*: But *Both agree* in the *Concluſion*; For he alſo puts it upon the DESPAIR OF THE RECOVERY of the Ship. And this Hope, or Deſpair, muſt be a reaſonable and juſt One; not a whimſical and arbitrary Fancy, or a mere Wiſh. * *V.* 29 *G.* 2. *c.* 34. *p.* 572. §. 24. (the Prize-Act,) which directs, "that retaken Ships ſhall be reſtored to the Owners they paying a Salvage in Proportion to the Time they were in the Poſſeſſion of the Enemy."

This Veſſel was 8 Days in Poſſeſſion of the Enemy; near a Month, out of the Power of the Owners, (the Inſured;) and almoſt all the Hands taken out. So that, by the Terms and Intent of the Inſurance (which muſt be taken favourably for the Inſured,) this Voyage muſt be taken to have been totally defeated to the Inſurers; the Adventure totally ſtopt; and conſequently the Condition broken, *as between the Inſurers and the Inſured.*

And this is different from Caſes of SALVAGE, where the *Property is not altered*; but the Marine Law only determines what ſhall be paid by the Owner, for the Salvage.

This is a *total* Loſs: It was ſo long in Poſſeſſion of the Enemy that the *Spes recuperandi* was *gone.*

Though this Ship was not carried *into Port*, nor *within the Enemy's Fleet*, yet it was 8 DAYS *in Poſſeſſion* of the Enemy; and it might have been as many Months. And the *Spes recuperandi* would be as abſolutely gone, as if it had been carried into the Enemy's Fleet: Out of which, it might, *poſſibly*, be immediately retaken.

Therefore the being carried *infra Præſidia* of the Enemy cannot be the *true* Rule: But the *true and certain Rule* muſt, in reaſon, be, where the *Spes recuperandi is gone.*

* P. 686. * Indeed the being carried *infra Præſidia* may, in many Caſes, be an Evidence of this.

Now upon the State of the preſent Caſe, all Hope of Retaking was totally loſt and gone.

However, the *Principle* of this Caſe is not new. For by *Common Law*, the Thing taken from the Owner in War is *gone*, unleſs the Owner makes freſh Purſuit: And the Property of the Thing ſo taken in War belongs to the Captor. And the Common-Law Rule is—That in a War, the Captor of a Ship has a Right to the Ship and Goods taken; *unleſs* the owner makes freſh Purſuit *ante Occaſum Solis*. 7 *E.* 4. 14. * *Vaviſour* ſaid, ‖ that it was adjudged in the Time of that ſame King, "q̄ *un* ¯ *priſt tiel Meaſon des* "*Enemies quel avoit priſe devant dun Engliſhe, que* il avo- "roit ceo *come choſe gaigne en batel &c: Et nemy le Roy,* "*ne l'Admiral*, ne le Partie a qui le Property fuit devant "&c; *Pur ceo* q̄ *le Partie* ne vient freſhment, meſme le "jour q̄ *il fuit priſe de luy, et ante Occaſum Solis, Et claime* "*ceo.*" And this Determination has never been ſhaken by any *Common Law* Reſolution: It has rather been confirmed and recogniſed.

* *Vaviſour* was not then a Judge, nor even a Serjeant.

And the Determinations of the *Admiralty*-Courts will not affect this Caſe: For they have determined either upon particular Acts of Parliament, or upon the Principle of *other* Laws than the Common Law.

But this Court will follow the Determination of the Common Law. And the 3 Acts of Parliament made in the preſent Reign (which are All, upon this Head) are built upon the ſame Principle. The † Saving-Clauſe in 29 *G.* 2. *c.* 34. ſuppoſes the Right of the Owner to be extinguiſhed and gone; and that the Captor had a Right to the Thing taken: Otherwiſe, the Parliament had no Right to impoſe upon the Original Owners ſuch Terms of Payment for Salvage. The Act itſelf even calls them the *former* Owners: And it is the *Bounty* of the Act, to reſtore to them *any Part* at all.

† §. 24.

No Miſchief can ariſe from this Conſtruction: Many Inconveniencies will flow from a contrary One. And Courts of Law will put liberal Conſtructions upon Policies of Inſurance.

This Principle was recogniſed by Ld. Ch. J. *Lee* in the Caſe reported in 2 *Strange* 1250. *Denn* v. *Dicker:* Where the being carried into the Enemy's Port and detained 8 Days was eſteemed a total Loſs of the Voyage; and the Property of the Owners gone.

This

* This is a Queſtion *only between* the *Inſurer* and the *Inſured:* And the Inſurer had undertaken againſt *all Sorts* of Perils, for a Premium received. And here the Voyage was totally loſt; and the Cargo entirely periſhed. So that there can be no Doubt as to the *real Juſtice* of this Caſe. * P. 687.

Second Point—The Inſured had a *Right to* ABANDON the Ship to the Inſurers, after her Coming into *Milford Haven.* For the *Property inſured* was irrecoverably *deſtroyed.* And here was *immediate Notice* given to the Inſurers, of the abandoning of it to them. 2d Point.

Molloy Lib. 2. *c.* 7. *pa.* 278. and *Maline's Lex Mercatoria* 111. lay down the Rules of abandoning. *Maline's Lex Mercatoria* 115. puts it "where there is no Probability of "putting to Sea, with the Thing inſured."

Now here, the Ship was freighted with a *periſhable* Commodity, (Fiſh, from *Newfoundland,*) bound to hot Countries, (*Portugal* or *Spain*;) was taken; and afterwards retaken, and brought into *Milford Haven,* without ſufficient Hands of her own, and requiring ſo much Refitment as was impoſſible to be finiſhed before the Cargo would and muſt be ſpoiled: And Part of the Cargo was thrown over-board, too. To what Purpoſe then ſhould the Inſurer be at the Expence of refitting the Ship, to carry a *ſpoiled* and *uſeleſs* Cargo?

Little is to be found in our Books, about Abandoning. The Rule laid down was, "That the Inſured has a Right "to abandon to the Inſurers, where there are *no Hopes of* "*Saving the periſhable Cargo:* Provided there be no "Fraud."

This Ship was in Port; the Hands all in *France,* in Priſon. Beſides, here was a total Loſs: For the Coſts of Salvage exceeded the Value of the Thing ſaved. Therefore they had a Right to abandon.

Sir *Richard Lloyd* and Mr. Serjeant *Davey,* on Behalf of the Defendant, argued upon the ſame two Points; but made very different Deductions.

Firſt—The Inſurers could *not* be liable as for a TOTAL Loſs: (Though they agreed it was an Average-Loſs.) 1ſt Point.

The *Capture* of the Ship was *not* a *total* Loſs. The *Property* was *not* diveſted out of the Owners: *A mere Capture,* without being carried *infra Præſidia,* or ſome other

* P. 688. † They did ſo. But there is no Determination of the Caſe itſelf, in *Lucas:* He reports it to be adjourned for further Argument. N. B. Mr. Juſtice *Foſter* ſaid "That *Lucas*'s Report of that Caſe (of which He Himſelf had a Note,) was a pretty good One."

* *ſuch Circumſtance*, will *not* alter the Property. The *Taking out the Mariners*, and putting in the Enemy's Crew, is *not enough* to do it. Nor is the detaining it 8 *Days:* For it has been holden that 9 Days will not alter the Property. In *Lucas's Rep.* 77. *Aſſievedo* v. *Cambridge*, The Court held *this* to be † very plain, "That the Property "was *not* there altered by the taking. Yet in that Caſe there was 9 Days Poſſeſſion by the Enemy. And Dr. *Henchman*, in arguing for the Defendant, ſaid That the Queſtion would not have borne a Diſpute in the *Admiralty*-Court: For that the Law is clear, "That not Length of "Time, but the bringing *infra Præſidia*, is that which "diveſts the Property." And He even cited a Caſe of 4 Years Poſſeſſion not altering the Property; and alſo a great many other Authorities, to prove "That the Pro-"perty is not diveſted without bringing the Ship *Infra Præ-"ſidia*." *Bynkerſhoek's Quæſtiones Juris publici, Lib.* 1. *c.* 4, is contrary to *Grotius*'s Opinion; and ſays, "That "Length of Time alone is *not* ſufficient to diveſt the Pro-"perty." Therefore this was *only* an Average-Loſs; not a *total* Loſs, or a Diveſting of Property: And if ſo, the Inſurer cannot be intitled to Recover.

The Statute of 29 *G.* 2. *c.* 34. § 24. directs Ships taken and retaken to be reſtored to the Owners, on paying *Salvage*. This was an Inſurance *with Benefit of Salvage:* So that the VOYAGE was *not* inſured; but ONLY *the Ship and Cargo*.

The Diſtinction is between ſuch Inſurances as this (*with Benefit of Salvage*,) and Inſurances *Intereſt or no Intereſt*. In the former Caſe, no Prevention of the *Voyage* can make the Inſurers liable.

There are 3 Caſes on this Head.

Pond. v. *King*, *H.* 21 *G.* 2. *B. R.* Where the Interruption and Loſs of the *Voyage* was holden to be the Thing inſured againſt, by *that* Policy; which was without Benefit of Salvage, and Intereſt or no Intereſt, and free of Average: And this was holden not to be an Average-Loſs; but a *total* Loſs, within the Terms and Extent of that Policy.

De Paiba v. *Ludlow*, *Tr.* 5 *G.* 1. *C. B.* reported in *Comyns* 360. An Aſſumpſit upon a Policy whereby the Defendant inſured the Plaintiff, Intereſt or no Intereſt; and merely a *Wager*-Policy: And the Ship was taken by a Pirate, detained 9 Days, and then retaken. This was determined for the Plaintiff; becauſe he received a Damage by the Interruption of the *Voyage*.

Fitzgerald

* *Fitzgerald* v. *Pole*, *P.* 23 *G.* 2. Where the Plaintiff's Intereſt was by the Policy ſettled at 1000*l.* And there was Benefit of Salvage. The Crew mutinied: Whereby the *Cruiſe* was totally interrupted and loſt. It was holden *not* to be a *total* Loſs: Though the Voyage was obſtructed by a Mutiny. * P. 689.

Here, neither the Obſtruction of the Voyage, nor the Loſs of the Mariners, makes it a total Loſs: And if not, the Inſurer is not liable.

Many Things may be thrown out of the Caſe, as to the firſt Point, the Loſs of the Ship: *viz.* the Cargo being *Fiſh*; the *Tempeſt*; the Saving *Part of the Cargo*.

They denied the * Principle laid down by their Opponents as the Rule of the Common Law, to have been ever determined: On the contrary, there has been a vaſt Variety of Opinions about it. Nor indeed can any Determination be made, on the Principles of *our Municipal* Laws: For the Queſtion concerns *Foreigners*, as well as Natives; and is a Queſtion of *general* Law, not of any particular and local Law. **V. ante* 686.

The Acts of Parliament that have been mentioned, are not built upon the Principle that has been aſſigned, (*V. ante* 686;) but upon right Reaſon, Juſtice, and Equity. Whether this was a "total Loſs, or not," muſt be determined by the Laws of War, and by the Law of Nature, that is, of right Reaſon.

The Captor has, for a Time, *only the poſſeſſory Right*; *not* the *abſolute* Right. The Right to *take*, is not the *perſonal* Right of the Taker; but the Right of the Subject of that Nation of which He is a Subject. So, the Right of Re-*taking*, is not *perſonal* to the Re-*taker*; but *national*, to any Subject of the Re-taker's Nation. At firſt, Each is *only poſſeſſory*. Neither *Taking* nor *Re-taking* give an *abſolute* Property.

The *freſh Purſuit* muſt depend upon *Circumſtances*: It cannot be confined to any *limited exact* Time; (as *ante Occaſum Solis.*) *Burlamaqui's Principles of natural Law*, *Lib.* 1. *c.* 6. *Lib* 2. *c.* 7. A *freſh Purſuit* carried on as ſoon as may be, will prevent the mere *poſſeſſory* Property from becoming an *abſolute* Property. Our Ships of War and Privateers are in a CONSTANT *State of Purſuit*: They cruiſe, in order to *re-take*, as well as to take.

Indeed there muſt be a *fixed Limit* of the Time of this Poſſeſſory Property *becoming abſolute*. And this Limit is, When the

* P. 690. * the right Owner may be ſaid to GIVE UP his Claim, his *Spes recuperandi*. It is agreed, that Carrying *infra Præſidia*, *merely*, will not be a ſufficient Limit: Neither can the *mere Effluxion of Time*. This *fixed Limit* has never been preciſely ſettled by Writers. Therefore the *Spes recuperandi* is and muſt be the CRITERION.

The Queſtion indeed will not be ſo eaſily ſettled. "*When* "*this Spes recuperandi is* GONE, and *when* it SUBSISTS" But in our Seas, where our Ships are in a conſtant State of Purſuit, this Hope of Recovery can never be ſaid to be gone ſo ſoon as *within* 8 DAYS; eſpecially, when in *Fact* and *Reality*, this Ship WAS *actually retaken* at the *End* of 8 Days.

THE COURT or a *Jury* are the proper Judges of this *probability* or *reaſonable Hope* of Recovery. *Till* that is gone, the *abſolute* Property is *not* veſted in the Captor.

The Acts of Parliament do not mean to conſider the Point of *Property*.

2d Point. Second Point—The Circumſtances ſtated do *not* intitle the Inſured to *abandon* the Ship to the Inſurers. This Right to abandon ſuppoſes a *total* Loſs. This was only an *Average* Loſs.

They diſputed the Poſition, "That the Inſured are to "be *favoured*." The Words of the Policy are calculated to prevent their abandoning. This Doctrine of abandoning, is a very inconvenient one to Inſurers.

As to *Molloy* and *Malines*—Almoſt any Thing may be proved by Citations from them*.

* Lord *Mansfield* ſpoke extremelywell of *Bynkerſhoek*'s Writings (who was later than all the reſt except *Cocceius*;) and recommended eſpecially, as well worth reading his Book of Prizes (*Quæſtiones publici juris.*)

The Under-Writer can never be ſuppoſed to inſure againſt theſe *accidental* Perils in diſtant Ports; but only againſt the *general* Perils of the EXISTENCE of the Cargo: The Inſurance is not upon the *beneficial Sale* of the Goods, upon the *Sanity* of them; but only upon the SAFETY of them.

There are ſeveral Caſes, where the Ship was totally loſt, and there was an End of all Claim and Right.

As to Inſurances upon a *Cruiſe*, All thoſe Caſes are cut up by the Roots, by the Caſe of *Fitzgerald* v. *Pole*: Which determined "that the Object of Inſurance, is the BODY *of* "*the Ship*, *not* the Cruiſe."

Bynkerſhoek's

* *Bynkerſhoek*'s Opinion is, "That there neither is nor "*can be* any *general* Rule laid down for a Limit: But every "Caſe muſt depend upon its own Circumſtances. *" * P. 691.

* Lord *Manſfield*.

He does ſay ſo: And he combats the Opinion of *Grotius*, (ſupported by many other Writers,) "that 24 Hours *quiet* Poſſeſſion is the fixed Rule."

There is a Common Law Caſe, in *March* 110. *pl.* 188. "That the Property is *not* altered, unleſs the Ship be "brought *infra Præſidia* of the Enemy."

The Counſel for the Plaintiff, in *Reply*—As to the Caſes that have been cited—

1ſt. The only Caſe which may ſeem againſt Us, is the Caſe abridged by *Viner*, in *Vol.* 16. *Pa.* 405, 406. Title *Policy of Inſurance*, *Letter* A. *pl.* 13. *Aſſievedo* v. *Cambridge*, reported in *Lucas* 77. (called 10 *Mod.*) "That be- "ing 9 *Days in Poſſeſſion of the Enemy* (without being "carried *infra Præſidia*) does *not* alter the Property." But there was *no Determination* upon that Caſe. Beſides, that was upon a Policy *Intereſt or no Intereſt*; and the *Voyage* was the Thing there inſured. 1ſt. Point.

The 3 Caſes of *Pond* v. *King*, *De Paiba* v. *Ludlow*, and *Fitzgerald* v. *Pole*, are no Proofs of their Point.

Pond v. *King* was Intereſt or no Intereſt. And the Court gave no Opinion about the *Property:* They founded their Judgment on the *Cruiſe* being inſured.

De Paiba v. *Ludlow* was an *Average*-Loſs. There was no Determination upon the *Property:* For there alſo, the *Voyage* was interrupted.

Fitzgerald v. *Pole* was alſo an Inſurance of a 4 Months' *Cruiſe*. So, *that* too was upon the *Voyage**.

* N. B. This Judgment was for the Plaintiff in *B. R.* who ſuppoſed this to be the *ſame* Point with the Caſe of *Pond* v. *King*: but the Houſe of Lords reverſed the Judgment, becauſe they thought it *diſtinguiſhable* from *Pond* v *King*.

The *Totality* of Capture depends upon the *Spes recuperandi:* And here was *none*. The *Average*-Loſs here ſtipulated for, is where the Voyage is performed *without Interruption*.

They do not diſpute our Principle "of the *Spes recupe-* "*randi* being the *true Criterion*." But they ſay, "Our "Ships are in *conſtant Purſuit*, in Seas frequented by our "Men of War and Privateers."

Now

* P. 692. * Now it is hard to conceive a Purſuit WITHOUT *an* OBJECT, or even a *Knowledge* of any particular Ship's being taken. *Freſh Purſuit* means the going in Queſt of *that particular Individual* Ship, which is taken.

This Rule would carry it much too far, and proves too much. For if 8 Days be not ſufficient, it might be carried to 8 or 10 Months, or to any *indefinite* Time: So that there would be *no Limit at all* left. This is a Queſtion that *our* Courts muſt determine according to *our* Laws. We only contend for the Time of a *reaſonable* Hope of Recovery: Not for a *wanton* or *groundleſs* Hope. Now *no* ſuch *reaſonable* Hope can remain, after the Ship's continuing 8 Days in Poſſeſſion of the Enemy.

Grotius, in *Lib.* 3. *c.* 6. *pa.* 285. ſays—"Sed recentiori "jure Gentium inter Europæos populos introductum vide- "mus, ut talia capta cenſeantur, ubi per horas viginti "quatuor in poteſtate hoſtium fuerint."

2d Point. 2dly. It has been urged, "that the Inſured can in *no* "Caſe *abandon*." On the contrary, All provincial Laws allow the Power of abandoning, in *ſome* Caſes *.

* Lord *Mansfield*—It goes ſo far back, as the *Rhodian* Law and the Laws of *Oleron*.

This Caſe falls within the *Reaſon* of the Caſes that have been already cited: And the Inconveniencies that have been ſuggeſted, are altogether imaginary.

Lord MANSFIELD obſerved, in general, that a large Field of Argument had been entered into; and it would be neceſſary to conſider the Law of Nations; our own Laws, and Acts of Parliament; and alſo the Law and Cuſtom of Merchants, which makes a *Part of* our Laws.

CUR. ADVIS.'

On *Thurſday*, 23d of *November* 1758—

His Lordſhip delivered the Reſolution of the Court, (after having firſt ſtated the Caſe and Queſtions, very particularly.)

Lord MANSFIELD—

It is not neceſſary to confine what ſhall be ſaid, to the two diſtinct Queſtions that are ſtated.

The General Queſtion is, Whether the Plaintiffs were, on the 18th of *January* 1757, intitled to recover againſt the Inſurers, *as upon a* TOTAL *Loſs*; Under an Offer

"to

* "to *abandon* the Ship and Cargo to the Inſurers, for "them to make what Advantage of Salvage they could." (For an Offer "to abandon" was *then* made: And nothing has happened ſince that Time, to alter the Caſe.) * P. 693.

There is one Point which, We are All of Opinion, is immaterial *as between the* INSURERS *and the* INSURED; *viz*, "Whether by this Capture, the PROPERTY was or "was not *transferred to the Enemy*, by the Law of Nations." *That Queſtion* can happen but in *two* Caſes: namely, (1ſt) Between the Owner and a Neutral Perſon who has *bought* the Capture from the Enemy; (2d.) Between the Owner and *Re-Captor*.

If the Ship taken by an Enemy *eſcapes* from the Enemy, or is *retaken*; or if the Owner *redeems* (ranſoms) the Capture; his Property is thereby *reveſted*: Which Property in the Ship taken was, by the Law of Nations obtained by the Captor.

The General Propoſition of Writers upon this Subject is, That "*quæ ab hoſtibus capiuntur*, ſtatim *Capientium fiunt*:" Which is to be underſtood, "when the *Battle is over*." Indeed, Nothing can be ſaid to be *taken*, *till* the Battle is *over*: And the Battle is *not over*, *till* all immediate Purſuit has ceaſed, and all Hope of Recovery is gone. This is the Definition of a Capture, referred to by our Prize-Act 29 *G.* 2. *c.* 34. of a Ship taken by the Enemy. And accordingly, *Voet*, in his Commentary upon the *Pandects*, *Lib.* 49. Tit. 15. *Vol.* 2d. 1155. and many Authors he refers to, maintain, with great Strength, "per *ſolam* OCCU-"PATIONEM *dominium prædæ hoſtibus acquiri*."

One Argument uſed to prove it, is, "that the Inſtant "the Captor has got *Poſſeſſion*, no Friend, Fellow-Soldier, "or Ally, can take it from him; becauſe it would be a "*Violation of his Property*."

But *other* Writers and States have drawn *other* Lines, by arbitrary Rules; and partly from *Policy*, to prevent *too eaſy* Diſpoſitions to *Neutrals*; and partly from *Equity*, to extend the *Jus Poſtliminii* in Favour of the *Owner*. No wonder there is ſo great Incertainty and Variety of Notions amongſt them, about fixing a poſitive Boundary *by the mere force of Reaſon*; where the ſubject Matter is *arbitrary*, and not the Object of *Reaſon alone*.

Some have ſaid, from the *Roman* Law (which was introduced in Favour of the Liberty and Condition of a *Roman* Citizen taken Captive,) "that the Prize muſt be brought "*infra Præſidia*. But, *what* Cuſtody *at Sea* ſhould be equal "to *Præſidia* at *Land*," is a new Fund of Diſpute, and leaves the Matter juſt where it was.

The

* P. 694.

* *V.* The Ordinances of *Lewis* 14th.

† *Quæſt. Jur. pub. L.* 1. *c.* 4.

* The Writers whom *Grotius* follows, and many more who follow him, and ſome * Nations, have made 24 *Hours* quiet Poſſeſſion by the Enemy, the Criterion. But *this*, † *Bynkerſhoek* and other Writers whom he follows, and ſeveral Nations abſolutely *deny*. *Some* have ſaid that the Ship muſt be carried into the *Enemy's Port*, *condemned* there, ſail *out again*, and arrive in a *Friend's Port*. All theſe Circumſtances are very arbitrary: And therefore *this* is generally *exploded*.

I have taken the Trouble to inform Myſelf of the Practice of the Court of *Admiralty in England*, before any Act of Parliament commanded Reſtitution, or fixed the Rate of Salvage: And I have talked with Sir *George Lee*, who has examined the Books of the Court of Admiralty, and informs me That *they* held the *Property* NOT *changed*, ſo as to bar the Owner, in Favour of a Vendee or Recaptor, *till* there had been a *Sentence of Condemnation*; and That in the Reign of King *Charles* the 2d. Sir *Richard Floyd* (Father of the late Sir *Nathaniel)* gave a ſolemn Judgment upon the Point, and decreed Reſtitution of a Ship retaken by a Privateer, after ſhe had been 14 *Weeks* in the Enemy's Poſſeſſion, *becauſe ſhe had* NOT *been* CONDEMNED. Another Caſe, upon the *ſame Principle*, againſt a Vendee, is cited at the End of *Aſſievedo* v. *Cambridge*, in 1695, (*Lucas* 79.) after a *long Poſſeſſion*, *two Sales*, and *ſeveral Voyages*.

But whatever Rule ought to be followed, in Favour of the *Owner*, againſt a RECAPTOR OR VENDEE, it can no way affect the Caſe of an *Inſurance*, between the INSURER and INSURED. (Upon an Action againſt the Hundred for a Robbery, a Queſtion might as well be ſtarted, "Whether the Property of the Goods, as againſt the "Owner, was changed by the Sale.")

The Ship is *loſt*, by the Capture; though She be never condemned at all, nor carried into any Port or Fleet of the Enemy: And the Inſurer muſt pay the Value. If, *after* Condemnation the Owner recovers or retakes her, the Inſurer can be in no other Condition than if ſhe had been recovered or retaken *before* Condemnation. The Reaſon is plain from the Nature of the Contract. The Inſurer runs the Riſque of the Inſured, and undertakes to indemniſy: He muſt therefore bear the Loſs *actually* ſuſtained; and can be liable to *no more*. So that if *after Condemnation*, the Owner recovers the Ship in her complete Condition; but has paid Salvage, or been at any Expence in getting her back; the Inſurer muſt bear the Loſs ſo *actually ſuſtained*.

A Capture by a *Pirate*, (and in *Spain*, *Venice*, and *England*, the Goods go to the Captor of the Pirate, againſt the

* the Owner; as there can be no Condemnation, to intitle the Pirate;) or a Capture *under a Commiſſion*, where there is *no War*; do not change the Property. Yet, as between the *Inſurer* and *Inſured*, they are juſt upon the *ſame* Foot as Captures by an *Enemy*. * P. 695.

This Point never would have been ſtarted in Policies *upon real Intereſt*; becauſe it never could have varied the Caſe: (And in *this* Cauſe, the Queſtion could not have been material, if the Parties had not ſuffered the Cargo to periſh, while they ſquabbled *Who* ſhould take it.) But *Wager-Policies* gave Riſe to it: It was neceſſary to ſet up a total Loſs as between third Perſons, for the Purpoſe of their *Wager*; though *in Fact* the Ship was ſafe, and reſtored to the Owner.

In the Caſe of *Aſſievedo* v. *Cambridge*, the Man of War which retook the Ship, brought her into the Port of *London*, and reſtored her to the Owner upon reaſonable Redemption: (That appears from the Special Verdict; though not ſtated in *Lucas*.) And then, the *Owner*, not abandoning the Ship, could only have come upon the Inſurers for the *Redemption*; and no Queſtion could have ariſen upon the *Change of Property*. But the Policy being *Intereſt or no Intereſt, without Benefit of Salvage*, the Queſtion aroſe upon the Terms and Meaning of the *Wager*. That Caſe was not determined.

In the Caſe of *Spencer* v. *Franco*, before Ld. *Hardwicke* at *Guildhall* 1735, the *South-Sea* Ship, Prince *Frederick*, had returned ſafe to the Port of *London*, with her Cargo: The *Wagerers* contended "She was totally loſt at *La Vera* "*Cruz*," from this Notion of a Change of Property; but failed.

De Paiba v. *Ludlow* was alſo a *Wager*-Policy; and the Property could not be changed, becauſe there was then no War, nor even a Declaration of War: But the Court held "that as the Ship was once taken in Fact, the Event had "happened, though She was afterwards recovered." So, in the Caſe of *Pond* v. *King*; which was alſo a *Wager*-Policy.

But in the Caſe of *Pole* v. *Fitzgerald*, the Majority of the Judges and the Houſe of Lords (in 1754, by the Name of *Fitzgerald* v. *Pole*,) held, "that though the Ship might be "deemed *for a Time*, as loſt: yet, as She was afterwards "recovered, the Event of a total Loſs had *not finally* hap-"pened according to the Conſtruction of the Wager."

Theſe are all the Caſes where this Queſtion has been debated. But *this* is a Policy upon REAL INTEREST.

The

* P. 696. * The ſingle Queſtion therefore upon which *this* Caſe turns, is, "Whether the inſured had, under all the Cir- "cumſtances, upon the 18th of *January* 1757, an *Election* "to ABANDON."

The Loſs and Diſability was in its Nature *total*, at the *Time* it happened. *During Eight Days*, the Plaintiff was certainly *intitled* to be paid by the Inſurer as for a *total* Loſs: And in Caſe of a *Re-capture*, the Inſurer would have *ſtood in his Place*. The ſubſequent Re-capture is, at beſt, a Saving only of a *ſmall Part: Half* the Value muſt be paid for *Salvage*. The Diſability to *purſue the Voyage*, ſtill continued. The Maſter and Mariners were *Priſoners*. The Charter-party was *diſſolved*. The Freight, (except in Proportion to the Goods ſaved,) was *loſt*. The Ship was neceſſarily brought into an *Engliſh Port*. What could be ſaved, might *not be worth the Expence* attending it: (Which is proved by the Plaintiff's Offer to abandon.)

The *ſubſequent* Title to *Reſtitution* ariſing from the Recapture, at a great Expence, of the Ship diſabled to purſue her Voyage, cannot take away a Right *veſted* in the Inſured at the Time of the Capture. But becauſe he cannot recover more than he has ſuffered, he muſt abandon what may be ſaved.

The better Opinion of the Books ſays—"*Sufficit* ſemel "extitiſſe *conditionem, ad beneficium aſſecurati, de amiſſione* "*navis*; etiam *quod poſtea ſequeretur* recuperatio: *Nam* "*per talem recuperationem*, non *poterit præjudicari aſſecu-* "*rato*." I cannot find a ſingle Book, antient or modern, which does not ſay, "that in Caſe of the Ship being "taken, the Inſured may demand as for a *total* Loſs, *and* "*abandon*." And what proves the Propoſition moſt ſtrongly, is, That by the *general* Law, he may abandon in the Caſe merely of an *Arreſt*, or an *Embargo*, by a Prince *not* an Enemy. Poſitive Regulations in different Countries have fixed a preciſe Time before the Inſured ſhould be at Liberty to abandon in that Caſe. The Fixing a preciſe Time proves the general Principle.

Every Argument holds *ſtronger*, in the Caſe of the *other Policy* with Regard to the GOODS. The CARGO was in its Nature *periſhable*; deſtined from *Newfoundland* to *Spain* or *Portugal*; And the Voyage as *abſolutely defeated*, as if the Ship had been wrecked, and a third or fourth of the Goods ſaved.

No Capture by the Enemy, though condemned, can be ſo total a Loſs as to leave *no Poſſibility* of a Recovery. If the Owner himſelf ſhould retake at *any* Time, he will be intitled: and, by the * Act of Parliament, if an *Engliſh* Ship

* *V.* § 24.

* Ship retakes at *any* Time (*before* Condemnation or *after*,) the Owner is intitled to Reſtitution, upon ſtated Salvage: This Chance does not ſuſpend the Demand, for a *total* Loſs, upon the *Inſurer*: But Juſtice is done, by putting him in the *Place* of the *Inſured*, in Caſe of a Recapture. * P. 697.

In Queſtions upon Policies, the Nature of the Contract, as an *Indemnity* and *nothing elſe*, is always *liberally* conſidered. There *might* be Circumſtances, under which a Capture would be but a *ſmall temporary* Hindrance to the Voyage; perhaps, *none* at all: As, if a Ship was taken, and in a Day or two eſcaped *entire*, and *purſued her Voyage*. There are Circumſtances, under which it would be deemed an *Average*-Loſs: If a Ship taken is *immediately ranſomed* by the Maſter and *purſues* her Voyage, there the Money paid is an *Average*-Loſs. And in ALL Caſes the Inſured may chuſe "NOT *to abandon*.

In the ſecond Part of the "*Uſage and Cuſtoms of the Sea*" (a *French* Book tranſlated into *Engliſh*,) a Treatiſe is inſerted called "GUIDON:" Where * after mentioning the Right to abandon upon a Capture, he adds, "or any other "*ſuch* Diſturbance as *defeats the Voyage*, or makes it *not worth* "*while*, or worth the *Freight*, to *purſue* it." * C. 7. §. 1.

I know that in *late* Times, the Privilege of *abandoning* has been *reſtrained* for fear of letting in Frauds: And the Merchant can *not* elect to turn what, at the Time when it happened, was in its Nature but an *Average* Loſs, into a total One, by abandoning. But there is no Danger of Fraud, in the *preſent* Caſe. The Loſs was *total*, at the *Time* it happened. It *continued total*, as to the Deſtruction of the *Voyage*. A *Recovery* of any thing could be had *only* upon paying more than half the Value (including the Coſts.) What could be ſaved of the Goods, might *not be worth the Freight* for ſo much of the Voyage as they had gone when they were taken. The *Cargo*, from its Nature, muſt have been ſold *where* it was brought in. The Loſs, as to the *Ship*, could not be eſtimated, nor the Salvage of *half* be fixed, by a *better* Meaſure, than a *Sale*. In ſuch a Caſe, there is no Colour to ſay, that the Inſured might not *diſentangle himſelf* from unprofitable Trouble and further Expence, and leave the *Inſurer* to ſave what he could. It might as reaſonably be argued, that if a Ship *ſunk* was *weighed up again* at a great Expence, the Crew having *periſhed*, the Inſured could not abandon, nor the Inſurer be liable, becauſe the *Body* of the Ship was ſaved.

We are therefore of Opinion, that the Loſs was TOTAL, by the Capture; and the Right which the Owner had, after the Voyage was defeated, "to obtain Reſtitution of the

"Ship

* P. 698. "* Ship and Cargo, paying great Salvage to the Re-cap- "tor," *might* be ABANDONED to the Inſurers, after She was brought into *Milford Haven.*

Let the *Poſtea* be delivered to the PLAINTIFF, in both Cauſes.

Friday 24th *November* 1758.

Hawks *verſ.* Croſton.

ERROR upon a Judgment of *B. R.* in *Ireland*, in an Action of Treſpaſs *Vi et Armis* for an Aſſault and Battery, brought there above 15 Years ago (in 16 *G.* 2.) charging Special Damages for a violent Battery upon the Plaintiff, whereby he loſt an Arm. The Defendant pleaded "Not guilty," as to *Vi et Armis:* and iſſue was joined thereon. As to the Special Damages, he pleaded, "ſon Aſſault de- "meſne." To which, the Plaintiff replied "De injuria "ſuâ propriâ, abſque tali cauſâ: On which, Iſſue is joined likewiſe. Upon Trial of theſe Iſſues, the Verdict finds the Defendant, GENERALLY, "*Guilty of the* TRESPASS "*within written;*" and gives the Plaintiff 850*l.* Damages. Judgment for the Plaintiff.

Mr. *Nares*, for the Plaintiff in Error, objected "That this "*Verdict is* INCOMPLETE; and the *Court cannot give* "*Judgment upon it*: It is no Verdict at all, as to the *mate-* "*rial* Iſſue, which affects the true Queſtion between the "Parties or the *Merits* of the Cauſe." Whereas a Verdict ought to be ſufficient, both in Point of *Matter* and of *Form.*

Here are two Iſſues (1.) "Whether Guilty, or Not guilty." On which Iſſue is joined; (2.) "Whether the De- "fendant beat the Plaintiff, *without the alledged Cauſe.*" And the Verdict is "That the Defendant is guilty of the "Treſpaſs, GENERALLY:" Which is no more than the mere Fact which the Defendant has acknowledged; but has inſiſted at the ſame Time, that he had a *Cauſe* for it. *Style* 150. *Jennings* v. *Lee: Style* 210. S. C. 1 *Siderf.* 341. *Burton* v. *Chapman.* 2 *Keble* 278, 280. S. C.

And this bad Finding can *not be aided* by any Statute, or by any other Method. *Style* 167. *Hobbs* v. *Blanchard* is in Point with the preſent Caſe: Where the Defendant was clearly found Guilty generally; (though he is *there* * *ſaid* to have been found *Not* guilty.)

*It is plainly an Error of the Peſs: The Word "*not*" is put for the Word "*Him.*"

An *immaterial Iſſue* cannot be aided by any Verdict: Neither can an *immaterial Verdict* be aided by *any* Means whatever. This Verdict ought to have been "Guilty as to "the firſt Iſſue;" And as to the ſecond Iſſue—"That the "Defendant beat the Plaintiff AS *in the Declaration is al-* "*ledged;*". (as in *Lilly's Entries* 516.)

Mr.

* Mr. *Aſhurſt contra*, for the Defendant in Error. * P. 699.

The Queſtion is "Whether this Verdict be *deciſive* be-"tween the Parties." The general Rule is "That Ver-"dicts ſhall be *favourably* conſtrued." And "if a Verdict "can be concluded out of the Finding, to the Point in "Iſſue, the *Court* ſhall work it into *Form*, and make it ſerve." *Hob.* 54. is ſo expreſsly. 47 *E.* 3. 19. *a.* there cited. *Trials per Paris*, 394 to 400.

Theſe Damages are not leſs than 850 *l.* And the Plaintiff is *precluded in Time*, from bringing a *new* Action: (For this is an Action of near 20 Years ſtanding, by Reaſon of the Defendant's having abſconded.)

This Treſpaſs muſt be intended an Aſſault *without* Cauſe: Elſe it would not be a *Treſpaſs*. And the Finding is, "That "he is guilty of the *Treſpaſs within written*:" Which is ſufficient. *Cro. Eliz.* 854. *Burper* v *Baker* proves it to be ſo.

It has been argued, "that this is Finding Nothing more "than the Defendant has already *acknowledged*."

But the Defendant does not here acknowledge the *Treſpaſs*: He only acknowledges the meer *Fact* of the *Aſſault*.

Style 150 & 210. is a very ſlight Authority: and not to the Point of a Finding by Verdict, ſo much as to the Joining of the Iſſue.

Mr. *Nares*, in Reply—*Cro. Eliz.* 854. is Right: For there the Finding was right as to the *eſſential* Part, and only defective in *Form*. Here, it is *eſſentially* incomplete. Nor do Mr. *Aſhurſt*'s other Caſes affect this preſent Caſe. The Defendant admits the Fact indeed: But he *adds* an Excuſe, ſufficient to juſtify it.

Lord MANSFIELD—The Queſtion is, "Whether this "Verdict is *ſo* uncertain, that the Court *can not give Judg-"ment* upon it; but muſt award a *Venire facias de novo*."

I think Mr. *Aſhurſt*'s Principle is true, and juſt; namely "That where the Intention of the Jury is manifeſt and be-"yond Doubt, the Court will *ſet right* Matters of *Form*, and "the mere Act of the *Clerk*."

And I think that the preſent Caſe is ſuch a clear Caſe, that the Court *may* here give Judgment upon the *ſubſtantial* Finding; though the *Clerk* may have been irregular and faulty

* P. 700. * faulty in Point of *Form:* It is very clear what the Jury *meant*.

M. Juſt. DENISON—Certainly, The Court ought not to award a *Venire facias de novo*, where the Verdict is *only* faulty in *Form*. And this here is no more than an Omiſſion of the Clerk in Point of *Form*, in not being more particular than it is. But the MEANING of the Finding is plain.

* *Toe, qui &c.* v. *Adlam*, was the Name of the Cauſe, in *his* Court.

He mentioned a Caſe *Temp.* Lord *Hardwicke* * *Adlam* v. *Toe*—A Writ of Error out of *Stepney Court*, *P.* 11 *G.* 2. *B. R.* Where the Iſſue was upon the Cauſe of Action ariſing within the Juriſdiction of the Court; (the Defendant having pleaded "that it aroſe *without*," and the Plaintiff having replied "that it aroſe within it;") And the Jury found "that the Defendant promiſed in Manner and Form "*prout* the Plaintiff had alledged *&c.*" Which was objected "not to be *ad idem*." There, indeed, the Judgment was reverſed upon *another Objection:* But in ſpeaking to the Objection which I have mentioned, the General Principle was allowed, from the Bench, "That Verdicts are not to "be taken ſtrictly (like Pleadings;) but that the *Court will* "*collect* the *Meaning* of the Jury, if they gave ſuch a "Verdict that the Court can underſtand them."

I am ſatisfied, upon the *Reaſon* of the Law, that this is ſufficient.

Hobart 54. lays down a very juſt Rule, "That though "the Verdict may not conclude formally or punctually in "the Words of the Iſſue, Yet if the Point in Iſſue can be "concluded out of the Finding, the Court ſhall work the "Verdict into Form, and make it ſerve."

Mr. Juſt. FOSTER— I think this is ſufficient. The Jury could not have found thus, *unleſs* the Defendant had failed in *proving* his Juſtification.

Mr. Juſt. WILMOT held accordingly — Every Body knows that this Sort of Trial, turns upon the Proof of the Juſtification: And *if* the Defendant *had*, in this Caſe, *proved* his Juſtification, the Verdict *could not* have been found as it is.

Hob 54. lays down a very right and juſt Rule—"That "if a Verdict can be concluded out of the Finding to the "Point in Iſſue, the Court ſhall work and mould it into "*Form*, according to the *real Juſtice* of the Caſe:" And *what* is the real Juſtice of the Caſe? That the Defendant has not proved his Juſtification; and therefore that there ought

to

* to be Judgment againſt him, notwithſtanding any irregula- * P. 701
rity or want of Form in *Wording* the Verdict.

Therefore I am very well ſatisfied that the Judgment is right.

Per. Cur. unanimouſly,

JUDGMENT AFFIRMED.

Lucas, *ex dimiſſ.* Dr. Markam et *al'*, *verſ.* Dr. Wilſon.

UPON ſhewing Cauſe why an Attachment ſhould not iſſue againſt Dr. *Wilſon*, for refuſing to perform an Award, made purſuant to a Submiſſion entered into by Rule of this Court, IN *the above mentioned Cauſe then there depending*, It became Part of the Queſtion, "Whether *this* "was *within* the Act of 9, 10 *W.* 3. *c.* 15. for determin-"ing Differences by Arbitration."

And the Court thought that it was *not*; but that it ſtood upon the Common Law, independent of the Act; which was made, to put Submiſſions to Arbitrations in Caſes where there was *no* Cauſe depending, upon the *ſame Foot* as thoſe where there *was* a Cauſe depending. But here *was* a Cauſe depending at the Time of the Submiſſion: And therefore the Caſe was *not* within the Proviſion of this Act.

And Lord MANSFIELD held this Act to be *only declaratory* of what the Law was before, in Caſes where there was a Cauſe depending in the Court.

He added, that the Court will *not enter* at all into the MERITS of the *Matter* referred to Arbitration; but only take into Conſideration ſuch legal Objections as appear upon the Face of the Award, and ſuch Objections as go to the *Miſbehaviour of the Arbitrators.*

In the preſent Caſe, the Rule for the Attachment was

MADE ABSOLUTE.

Rex *verſ.* Inhabitants of Shenſton.

Tueſday, 28th November 1758.

See the *Abridgment*, of this CASE, in the TABLE of the Principal Matters: and it may be ſeen *at large*, in my Quarto-Edition of SETTLEMENT-CASES, page 468. N°. 149.

* P. 703. Rex *verſ.* Earl Ferrers.

ON Mr. *Aſton*'s Motion for the Earl, and on reading the Act of Parliament made laſt Seſſions for the Separation of the Earl and Counteſs; and on the *Conſent* of Mr. *Campbell*, on Behalf of the Counteſs;

* *V. ante* 636. The Earl's * RECOGNIZANCE was DISCHARGED.

The End of *Michaelmas* Term 1758.

Hilary

* Hilary Term

* P. 704

32 Geo. 2. B. R. 1759.

Doe, ex dimiſſ. Odiarne, *verſ.* Whitehead.

H. 30 *G.* 2. *Rot'lo* 988.

Friday 26th *January* 1759.

THIS was a Special Caſe, from *Warwick* Lent-Aſſizes 1757.

In Ejectment, on the Demiſe of *Wentworth Odiarne* Eſquire, for divers Meſſuages and Lands in *Alleſley* in that County.

It appeared in Evidence, at the Trial, as follows; *viz.*

That *Timothy Stoughton* Gent. being ſeiſed in Fee of the Premiſſes in queſtion, by Indentures of Leaſe and Releaſe, (the Releaſe being dated the 1ſt of *March* in the firſt Year of Queen *Anne*,) in Conſideration of the Marriage of *Antony Stoughton* his eldeſt Son with *Frances* his Wife, and other the Conſiderations in the ſaid Releaſe mentioned, did convey to *Baſil St. Nicholas* and *Thomas Skeffington* Eſquires, the Premiſſes in queſtion; *To hold* to them their Heirs and Aſſigns, to the ſeveral Uſes following, that is to ſay, *To the Uſe* of the ſaid *Timothy Stoughton* for Life, with Remainder to Truſtees during the Life of the ſaid *Timothy Stoughton*, to preſerve contingent Remainders; Remainder to the ſaid *Antony Stoughton* for 99 Years if he ſhould ſo long live, with Remainder to Truſtees during the Life of the ſaid *Antony Stoughton*, to preſerve contingent Remainders; Remainder to the Uſe of the *firſt and other Sons* of the Body of the ſaid *Antony*, on the Body of the ſaid *Frances* lawfully begotten or to be begotten, *in Tail Mail*; Remainder to the Uſe of *Mary Odiarne*, Wife of *Charles Odiarne*, *Sole Daughter of the ſaid Timothy Stoughton*, for 99 Years if She ſhould ſo long live, with Remainder to Truſtees and their Heirs during the Life of the ſaid *Mary Odiarne*, to preſerve contingent Remainders; And from and immediately after

* P. 705. * the Death of the ſaid *Mary Odiarne*, *To the Uſe* of the *firſt and eldeſt Son of the Body of the ſaid Mary Odiarne* lawfully begotten or to be begotten, and of the Heirs Male of the Body of ſuch firſt and eldeſt Son iſſuing; with divers Remainders over, and with a Remainder or Reverſion to the right Heirs of the ſaid *Timothy Stoughton*.

The ſaid *Timothy Stoughton* died, (many Years ago,) in the Life-time of his Son *Antony*. *Antony Stoughton*, his Son, had by the ſaid *Frances* his Wife only One Son, named TIMOTHY.

Antony died in *July* 1734; leaving by the ſaid *Frances* (who died in his Life-time) the *ſaid Timothy* his only Son and Heir.

Timothy Stoughton, the Son of *Antony*, died in *June* 1753, without Iſſue.

The ſaid *Mary Odiarne* died in *January* 1735; leaving Iſſue (by *Charles Odiarne* her Huſband) *Wentworth Odiarne*, her firſt and eldeſt Son; who is the *Leſſor of the Plaintiff*.

It appeared alſo, That the ſaid *Timothy Stoughton* the *Grandſon*, in his Life-time, being *in Poſſeſſion* of the ſaid Premiſſes *under* the before-mentioned Indentures of Leaſe and Releaſe, by Indentures of *Leaſe and Releaſe* dated the *26th and 27th of January* 1735, PREVIOUS *to his Marriage* with *Anne Samwell*, Spinſter, and in Conſideration of the ſame Marriage and of a Marriage Portion granted and releaſed, (amongſt other Lands and Tenements) the Premiſſes in queſtion, to Sir *Thomas Samwell* and *Thomas Samwell* Eſq; and their Heirs, *To hold* to the Uſes following; to wit, *To the Uſe* of the ſaid *Timothy Stoughton* the Grandſon and his Heirs, until the intended Marriage between him and the ſaid *Anne Samwell*; And then to the Uſe of Truſtees for 500 Years; Remainder to the ſaid *Timothy Stoughton for Life*; Remainder to Truſtees, to preſerve contingent Remainders; Remainder to the ſaid *Anne Samwell* for Life, as Part of her Jointure; Remainder to the Uſe of the firſt and other Sons of the ſaid *Timothy Stoughton* on the Body of the ſaid *Anne Samwell* in Tail Male; with Remainder to the ſaid *Timothy Stoughton* in Fee.

IN *which Indenture of Releaſe*, is a Covenant, by the ſaid *Timothy Stoughton*, "TO LEVY a FINE *ſur conuſance* "*de droit come ceo &c, with Proclamations, (inter al')* of "the Premiſſes in queſtion, to the ſaid Sir *Thomas Samwell* "and *Thomas Samwell* and the Heirs of the ſaid Sir "*Thomas*."

And it is *declared by the ſaid Indenture of Releaſe*, "that "the ſaid *Fine ſhould enure* to the ſeveral Intents and Pur-

"poſes

" * poſes *and for the ſeveral Eſtates in the ſaid Indenture of* * P. 706.
" *Releaſe contained*;" (and which are herein before-mentioned.)

It appeared that the ſaid *Marriage took Effect*; and that, AFTERWARDS, the ſaid *Timothy Stoughton, being in Poſſeſſion*, did in *Hilary Term* 1735, LEVY A FINE, *according to his ſaid Covenant*, with a *General Warranty* in the ſaid Fine, by the ſaid *Timothy Stoughton*, for him and his Heirs, " That they would warrant to the aforeſaid Sir *Thomas* and " *Thomas* and the Heirs of the ſaid Sir *Thomas*, the ſaid " Premiſſes in queſtion, againſt Him the ſaid *Timothy* and his " Heirs, for ever." And it appeared that the ſaid *Anne* his Wife, after his Death, entered upon and poſſeſſed herſelf of the Premiſſes in queſtion.

It alſo appeared That the ſaid *Wentworth Odiarne*, (the Leſſor of the Plaintiff,) before the Time of bringing this Ejectment, and of making the Demiſe by him in his Declaration mentioned, duly made an *actual Entry* into and upon all the Premiſſes in queſtion, TO AVOID *the ſaid Fine*.

It appeared alſo That the ſaid *Wentworth Odiarne*, the Leſſor of the Plaintiff, was *Heir at Law to the ſaid Timothy Stoughton the Grandſon*, at the Time of his Death; that is to ſay, only Son of *Mary Odiarne*, who was the only Siſter and Heir of *Antony Stoughton* the Father of the ſaid laſt mentioned *Timothy*.

On the Trial, a Verdict was found for the Plaintiff ſubject to the Opinion of the Court of King's Bench upon this Queſtion—" Whether the ſaid *Wentworth Odiarne* Eſq; " the Leſſor of the Plaintiff, is intitled to the Premiſſes in " queſtion, and ought to recover the ſame in this Cauſe; " notwithſtanding the ſaid FINE *ſo levied* by the ſaid *Timothy* " *Stoughton* the Grandſon, *and the* WARRANTY therein."

This Caſe was firſt argued in *Trinity* Term 1758; by Mr. *Knowler*, for the Plaintiff; and Mr. *Caldecott* for the Defendant.

The Arguments on the Part of the Plaintiff were founded on *Seymor*'s Caſe, 10 *Rep.* 95. The Sum of them was, " That the Leſſor of the Plaintiff might maintain an " Ejectment, (as an actual Entry had been made to avoid " the Fine,) unleſs a DISCONTINUANCE could be prov- " ed, or that the WARRANTY ſtood in his Way as a " *Bar* to his Title."

In Order to ſhew " that there had been NO *Diſcontinu-* " *ance*;" and conſequently, " That the Remainder of the " Leſſor was *not diveſted*;" Mr. *Knowler* ſaid it would be neceſſary

* P. 707. * neceſſary to conſider the *Operation* of the *Leaſe and Releaſe*, and of the *Fine:* Which were, in the preſent Caſe, quite *diſtinct* Conveyances.

A *Leaſe and Releaſe* made by a Tenant in Tail has the *ſame* Sort of Operation, as if Tenant in Tail conveys by *Bargain and Sale inrolled*: No greater Eſtate paſſes, by either, than the Tenant in Tail can *lawfully* convey; *Litt.* §. 606. And *if* it be the Property of the Conveyance made uſe of by the Tenant in Tail, to paſs NO *greater* Eſtate than the Tenant in Tail can *lawfully* convey; SUCH Conveyance does NOT *diſcontinue* the Eſtate Tail, *nor diveſt* the Remainder. Now, when Tenant in Tail, conveys by Bargain and Sale, or by Leaſe and Releaſe, (which has the ſame Operation,) THAT Conveyance makes NO Diſcontinuance of the Eſtate Tail; *neither* doth it diveſt the Remainders; Becauſe NO *greater* Eſtate paſſes by it, than a *baſe* Fee *determinable* upon the Death of the Tenant in Tail; which is *all* the Eſtate he can *lawfully* convey.

It is true, that a *Feoffment*, or a *Fine*, or a *Common Recovery*, will make a Diſcontinuance; becauſe a *Fee-ſimple* paſſes by *them*; which is a *greater* Eſtate than the Tenant in Tail can lawfully convey.

It cannot therefore be denied or diſputed, "That a *Fine* "which *paſſes a Freehold*, will diſcontinue an Eſtate Tail." But in *this* Caſe, the *Fine* paſſed NO *Freehold*; the Freehold having been, *before* the levying of the *Fine* conveyed by the *Leaſe and Releaſe*. This Fine, levied *after* the Marriage, being a DISTINCT *Conveyance*, executed ſubſequent to the Leaſe and Releaſe, All that it did or could do, was to *confirm* and *corroborate* the *baſe Fee* which paſſed by the Leaſe and Releaſe, and make it *more durable*. The Eſtate which paſſed by the Leaſe and Releaſe, was determinable on the *Death* of the Tenant in Tail: But the Fine made it more durable, namely, not to be determinable *till* the Death of the Tenant in Tail *without Iſſue Male*. Which Event being now come to paſs, and the Eſtate Tail being now ſpent by the Death of *Timothy Stoughton* without Iſſue, the Leſſor of the Plaintiff, *as the next Remainder-Man*, is intitled to the Eſtate, *unleſs* the WARRANTY ſtands in his Way, as a Bar to his Title.

But the *Warranty* has *no* Effect to bar or prejudice the Leſſor of the Plaintiff's Title; becauſe it *never* EXTENDED to his Remainder, and is now itſelf *determined*. A Warranty never bars a VESTED Eſtate, in Poſſeſſion, Reverſion, or Remainder: Before the Deſcent of the Warranty can *operate*, the Eſtate muſt be *deveſted and turned to a Right*; and this muſt be the Caſe before, or at the Time when the Warranty falls. *Co. Litt.* 388. *b.* And a *Remainder expectant* on an Eſtate Tail can *never be deveſted*, unleſs the Eſtate *on which* it

* it is expectant, be *diſcontinued*. But the Eſtate Tail which was in *Timothy Stoughton was not* diſcontinued, for the Reaſon already mentioned. Therefore the Warranty did *not extend* to the Leſſor's Remainder: But the Remainder continued undiſturbed in Him, to the Time of the Death of *Timothy Stoughton* without Iſſue Male. *This* having happened; the Warranty, which depended ſolely on the Eſtate created by the Leaſe and Releaſe, hath *loſt* its *Support*, and is therefore now determined, and no longer exiſts. Conſequently, it had no Operation on the Eſtate of the Leſſor, nor can be any Bar to his Title. * P. 708.

Mr. *Knowler* relied on the before mentioned Caſe in 10 *Co.* 95. as in Point to prove All theſe Poſitions, upon which he had founded his Argument.

It came into Judgment, upon a Special Verdict in an Ejectment on the Demiſe of *Edward Seymor*: And the Caſe was * this—

*V. 1. *Bulſtr.* 162. S. C. (there called *Heywood* v. *Smith.*)

Sir *Thomas Cheney* deviſed the Premiſſes in Queſtion to his Son *Henry Cheney* and the Heirs of his Body; Remainder to *John Cheney* and the Heirs Male of his Body; Remainder to his own right Heirs. Sir *Thomas* died. And after his Death, *Henry* entered; and (being ſeized in Tail, Remainder in Tail, Remainder to himſelf in Fee,) conveyed by *Bargain and Sale inrolled*, to *William Higham* and his Heirs; who entered and became ſeiſed accordingly. *Henry Cheney afterwards* levied a Fine with Proclamations, to *William Higham* and his Heirs; with general warranty. *William Higham* conveyed to *Henry* Lord *Seymor* in Fee. *John Cheney*, the Remainder-Man in Tail, had Iſſue *Thomas Cheney*. And then *Henry Cheney* died without Iſſue; *Thomas*, the Iſſue of *John* the Remainder-Man, being his Heir at Law. Upon the Death of *Henry*, *Thomas* entered, claiming the Premiſſes by Force of the Remainder limited to his Father: Upon which, *Edward Seymor*, who claimed under *Henry* Lord *Seymor*, entered and made the Leaſe to the Plaintiff: Who, being ejected by *Thomas Cheney*, brought the Ejectment. And the *Point* ſubmitted by the Jury to the Judgment of the Court, was, "If the Entry of *Thomas* was lawful, or not." And the Caſe having been argued at the Bench as well as at the Bar, The *Court* were unanimouſly of Opinion—

"That the *Fine* levied by *Henry Cheney* to *William* "*Higham* the Bargainee, did NOT DIVEST *the Remainder* "limited to *John Cheney*;

"That *no Eſtate of Freehold paſſed by the Fine*; but that "the Fine, being with Proclamations, *corroborated* the "Eſtate of the Bargainee, and made it *more durable*, by "making

* P. 709. " making it determinable on the Death of *Henry Cheney* " *without Iſſue Male*, where before it was determinable *on* " *his Death*;

" That if the Fine had been levied *before* the Bargain and " Sale, it *would* have made a *Diſcontinuance*; but being " levied AFTER it, it operated on the *Eſtate which paſſed* " *by the Bargain and Sale*, and was guided by it;

" That the WARRANTY created by the Fine did *not ex-* " *tend* to the Eſtate of *John Cheney* in Remainder; becauſe " it was *not diſplaced*, but *continued in him*;

" That when the *Eſtate to which the Warranty was an-* " *nexed*, determined by the Death of *Henry Cheney* without " Iſſue Male, the *Warranty was determined* for *Want of an* " *Eſtate* to ſupport it:"

He urged that this Authority concurs in *every* Point, with the Caſe now before the Court; And that there is no material Difference between them. *Seymor*'s Caſe aroſe indeed upon a Bargain and Sale inrolled: The preſent Caſe ariſes upon a Leaſe and Releaſe. But *their Operation* is *the* SAME, as to the Eſtate and Intereſt which *paſs* by them: For they *paſs no greater Eſtate* than the Party who executes them, can *lawfully convey*. And in *that* Reſpect, they *Both* differ from a *Feoffment* and from a *Fine*. And Lord Chief Juſtice *Holt*, in the Caſe of *Machil* v. *Clark*, 2 *Salkeld* 619. ranks them together, *as* Conveyances which have the *ſame Operation*, as to the Quantity of Eſtate paſſing by them, when made by Tenant in Tail. And *Seymor*'s Caſe was there holden for Law, by Him: Which adds greatly to its Weight and Authority.

Mr. *Caldecott*'s Argument tended to anſwer theſe Poſitions: and to prove that at the Time of the Fine levied, there was a *Diſcontinuance* of the Eſtate Tail.

He inſiſted, that even ſuppoſing theſe to be *diſtinct* Conveyances, Yet *Timothy Stoughton* the Grandſon was *Tenant in Tail in Poſſeſſion*, with Remainder over in Fee: For He had an Eſtate for Life in Him, and alſo the Old Intail; and they muſt be conſolidated.

However, this Leaſe and Releaſe and Fine are *not diſtinct* Conveyances; but all *one entire* Conveyance; All done at the ſame Time, upon the ſame Occaſion, and to the ſame Purpoſe, and under the ſame Deed: Whereas in *Seymor*'s Caſe, the Bargain and Sale were completed; and the Fine was a Twelve-month after; And the Perſon who levied it, had no Freehold in Him. And to prove that all this was only

One

* One entire Conveyance, He cited 5 *Co.* 26. Counteſs of * P. 710.
Rutland's Caſe. 2 *Co.* 72. *b.* Lord *Cromwell*'s Caſe, the 2d Reſolution. 3 *Bulſtr.* 256. *Havergill* v. *Hare*, (what was ſaid by Ch Juſt. *Montague.)*

Mr. *Knowler* conceded "That the Fine would diſcon-
"tinue the Eſtate Tail and deveſt the Remainder *(i. e.*
"drive the Party in Remainder to his Formdon), if the
"Perſon who levied the Fine was at that Time Tenant in
"Tail in Poſſeſſion."

Lord MANSFIELD put Mr. *Knowler* upon ſhewing that this was not ONE Conveyance or *Aſſurance*; and that it was not the Intention and Agreement of the Parties "that all
"the Uſes ſhould ariſe at *one and the ſame Time*, and be
"directed by the *ſame Deed.*"

Mr. *Knowler*—*After* the Marriage and *before* the executing the Fine, *Timothy Stoughton* had *only* an Eſtate *for* LIFE in him; (For the Leaſe and Releaſe had no other Operation;) Therefore, being ONLY *Tenant for* LIFE, he could *not diſcontinue the Eſtate.*

There are but four Diſcontinuances of Eſtates Tail.

The State of the Caſe ſhews the *Order* in which the Deeds were executed.

It is ſaid "That the Leaſe Releaſe and the Fine are *but*
"*One Conveyance.*" I ſay, they are *Three diſtinct Conveyances.* And AFTER *the Leaſe and Releaſe had taken their Effect*, THEN comes the Fine. Now *what Operation* could that have? *Not* to paſs the *Freehold:* For *that* was done before. And *without that*, it could *never* work a *Diſcontinuance* of the Eſtate Tail.

Lord MANSFIELD—I take it to be an exceeding plain Caſe, upon Mr. *Caldecott*'s ſecond Point.

IF you could *diſtinguiſh* theſe Conveyances, and ſuppoſe *Timothy Stoughton* to have been only Tenant for *Life*, at the Time of his levying the Fine, it would be the *Forfeiture* of his Eſtate for Life. So that you ſee the *Conſequence* of *this Poſition.*

But undoubtedly theſe are *All but* ONE ASSURANCE, and ſhall *operate as ſuch:* And the Fine is *Part* of it. This has been ſo holden in former Caſes; *Stapylton* v. *Stapylton*, and the Caſe of the *Manſel* Family: It was in both theſe Caſes, conſidered and taken that they were *all* but in the Nature of *One* Conveyance or *Aſſurance* (if you had rather call it ſo) and ſhall *operate as* ſuch. But the *Fine* ſhall never

* P. 711. never operate *contrary* to the Intention of the Parties, and ſo as to *defeat* it. And this is agreeable to the Doctrine laid down in Lord *Cromwell*'s Caſe, 2 *Co.* 72. *b.* and in the Counteſs of *Rutland*'s Caſe, 5 *Co.* 26. and in many modern Caſes.

If One was to argue on *Fictions*, the Fine would, by *Relation*, *precede* the Other Conveyance; and the Leaſe and Releaſe might be conſidered but as a Declaration of the Uſes of the Fine.

But this Conſtruction that is now attempted, would confound every Settlement made upon Marriage or other Events in Families; and would be of exceedingly inconvenient Conſequence. As to its being one *Conveyance*, or one *Aſſurance*, there is no great Matter of Difference between them, except merely in the Name.

I do not meddle with the WARRANTY: For *that* is out of the Caſe. I look upon *all* this as ONE ASSURANCE. If they were diſtinct Conveyances or Aſſurances, this Fine would be a Forfeiture of his Eſtate for Life under the new Settlement. Which plainly ſhews, that they were *never underſtood or intended* as diſtinct, but as one and the ſame.

Mr. Serjeant *Hewitt* would have had a ſecond Argument: He was on Mr. *Knowler*'s Side, and had taken Notes for a ſecond Argument on Behalf of the Plaintiff.

But Lord *Mansfield* did not care to delay it, *merely* for aſking. And both he and Mr. Juſt. *Wilmot* aſked the Serjeant if he had any *Doubt* " Whether a *Fine with Procla-*
" *mations* levied by Tenant in Tail in Poſſeſſion, will not
" *diſcontinue the Reverſion* in Fee, as well as *deveſt the Re-*
" *mainder* in Tail, ſo as to put the Remainder-Man to his
" Formdon."

Mr. Juſt. *Foſter* expreſſed Himſelf to the ſame Effect with his Lordſhip and Mr. Juſt. *Wilmot*. And I ſuppoſe that Mr. Juſt. *Deniſon* communicated to his Brethren " that he alſo
" concurred:" For

Lord *Mansfield* ſaid, " We are *All* ſatisfied that the
" *Poſtea* be delivered to the DEFENDANT."

But on the Day following (*Saturday* 10th *June* 1758,) Mr. Serjeant *Hewitt*, on Behalf of the Defendant, moved that this Caſe might be argued again: For that he thought he ſhould be able to maintain " That the Fine did *not* work a
" *Diſcontinuance*."

The

* The COURT having offered this Yeſterday, provided the Serjeant, upon conſidering of it, would ſay "that "He really thought he could maintain this Poſition;" and He now declaring "that He was * *really* of this "Opinion"— * P. 712.

[* So alſo was Mr. *Knowler*:

As the Releaſe *conveyed an Eſtate*; and therefore differed (as he apprehended) from a Covenant to levy a Fine, which conveys *no Eſtate*.]

The *Poſtea* wss *ordered* to be ſtayed; And that it ſhould be ſet down again in the Paper, in the following Term, for further Argument.

And after ſuch further Argument by Mr. Serjeant *Hewit*,—

Mr. *Norton* for the Defendant reſted it upon the Serjeant's *own* Argument: Which both He and the Court agreed to have been fair and candid, by Reaſon of his having ſtated all the * Caſes which were againſt him, as well as for him, fully and at large.

* 1 *Mod.* 109. *Benſon* v. *Hodſon*. *Littlet.* §. 614. 1 *Inſt.* 327. *a. b. Cro. Car.* 109, 110. *Iſeham* v. *Morrice*. *Litt.* §. 618. *Co. Litt.* 332. *Seymour's Caſe*. Lord *Cromwell's Caſe*. 2 *Ro. Rep.* 245. 2 *Lev.* 52. 4 *Mod.* 266. 3 *Bulſtr.* 250. 5 *Co.* 26. *Cro. Car.* 320. 1 *Ventr.* 280. and *Herring* v. *Brown*, in *Skinner* 35, 52, 71, 184. and *Carth.* 24. 1 *Inſt.* 42. *a. b.* 10 *Co.* 39, 42. *a. Hob.* 261. *Noy* 66.

Lord MANSFIELD,—

The *ſtrict* legal regular Form that ſhould have been purſued, would certainly have been a *Common Recovery*: But though a different Form has been purſued, yet it was plainly *meant* by *Timothy Stoughton* (the Grandſon,) that the Uſes of the Marriage Settlement ſhould be *ſupported by this Fine*.

And all was *executory* at the Time of making the Leaſe and Releaſe, which were executed *previous* to the Marriage; And the Covenant contained in the Releaſe, was "to levy "a Fine thereupon, *in Order* to carry them into Effect." All theſe are to be conſidered *as but* ONE *Conveyance*; and they *operate as a Declaration of Uſes*; Which Uſes all ariſe *out of the Fine*.

It would be a very ſtrange Thing, that *the* FORM of the Conveyance ſhould *deſtroy* the very INTENT of it; and that the Fine itſelf ſhould *deſtroy* the *Eſtate* of the Tenant for Life, by occaſioning a *Forfeiture* of it. Inſtead of this, *All* the preceding Tranſaction is *only* EXECUTORY: And the Operation is only as a *Declaration of the Uſes* of the Fine. 'Tis like a Caſe of a Tenant to the Præcipe: Who is conſidered merely as an Inſtrument, and not as the ſtrict real Owner of the Land. This Releaſe is but a Deed to lead the Uſes of the Fine.

Seymor's

* P. 713. * *Seymor*'s Caſe goes upon quite *different Grounds* from the preſent. There, *Henry Cheney* upon the 18th of *December* 22 *Eliz.* by Indenture of Bargain and Sale inrolled, ſold to *Higham* and his Heirs: By force of which, *Higham entered* and was *ſeiſed* accordingly. And AFTERWARDS in *Michaelmas* Term 22 *Eliz.* almoſt a Year after the Bargain and Sale, *Henry Cheney* levied a Fine with Proclamations, to the ſaid *Higham* and his Heirs, with general Warranty. So that the Bargain and Sale in that Caſe was totally UNCONNECTED with the Fine: And *Higham* is expreſsly found to have *entered* and been *ſeiſed* by *Force of the Indenture* of Bargain and Sale. Whereas in the preſent Caſe, the Whole is ONE *Aſſurance.*

As to the Objections—This Leaſe and Releaſe was not a complete Agreement; but *executory.* The *Intent* was, to make good by a Fine, as far as they could be made good by a Fine, the Uſes of the Family-Settlement which *Timothy Stoughton* the Grandſon was making, upon his Marriage with *Anne Samwell:* And the Intent was certainly *lawful,* though there is a Blunder in the Manner of doing it.

It would be an Occaſion of the utmoſt Confuſion in Families, all over the Kingdom, if in every Settlement or Conveyance, the ſeveral Deeds were to be *divided* in Point of Time; and the *ſtrict* legal Operation of each was to be conſidered *diſtinctly* and ſeparately from all the reſt, and from the general View and Intention of the whole Tranſaction. It would be juſt as reaſonable, to take the *ſeparate Clauſes* in one and the ſame Deed; and to hunt after ſuch different Conſtructions as the Words of them might bear, if they ſtood unconnected with the reſt of the Clauſes of the Deed, or in Deeds of quite another Import: Whereas in Point of Law and Reaſon, the *whole Tranſaction* and its *General Intention* ought to be taken together in *one* View.

Mr. Juſt. *Deniſon* was of the ſame Opinion.

Here are two Queſtions upon the Operations of this Conveyance, which was by Leaſe and Releaſe and a Fine: (1ſt.) "Whether it made a Diſcontinuance of the Eſtate "Tail;" (2d.) "Whether it deveſted the Remainder or "Reverſion." And both theſe Queſtions ſeem to me ſo very clear, that I think there could be no Doubt but this which has been endeavoured to be raiſed upon *Seymor*'s Caſe 10 *Co.* 95. *b.* 96: Which Caſe has been urged and relied upon as an Authority "That the Eſtate Tail is *not* diſcontinued, "nor the Remainder deveſted." Yet it ſeems to me otherwiſe, notwithſtanding what has been argued from that Caſe; which is *very diſtinguiſhable* from the preſent.

The

* *The Eſtate paſſes* BY *the Fine*, Whether the Uſes be declared *prior*, or *ſubſequent* to the Fine. The Deeds muſt be conſidered as *executory*, till the Fine is levied: and *then* the Eſtate paſſes *by* the *Fine*. * P. 714.

The Compariſon of this Caſe to *Seymor*'s Caſe is founded upon a *Miſtake*. For there the Bargainee was found "to "have *entered by Force* of the Indenture of Bargain and Sale, "and to have been *ſeiſed according* to it," *before Henry Cheney* levied the Fine to him: And the Judges were *obliged* to take the Fact to be as it was found by the Vedict: They were not at Liberty to look upon it as One and the ſame Conveyance or Aſſurance, (whatever they might really think it to be, in its Nature or Intention:) they were bound down by the *expreſs and particular Finding*. He was *found* to be *ſeiſed according to the Indenture* of Bargain and Sale: And therefore the Fine could, in that Caſe, *only confirm and corroborate* it. But if that Fine had been levied to the Bargainee *within the ſix Months*, I think the Eſtate would, in *that* Caſe, have paſſed *by the Fine*. That Caſe therefore turns merely upon the *Finding* of the Fact by the Special Verdict. But even there, if it had been found "That the Fine was "levied *to the Uſes* of the Bargain and Sale," I believe the Court would have looked upon the whole, as one and the ſame Aſſurance; and would conſequently have been of a different Opinion. Therefore That Caſe of *Seymor* is nothing to the Purpoſe of the preſent: For here, *All* the Deeds and the Fine are to be taken TOGETHER; and *All* of them ſo taken together, make *but* ONE *Aſſurance*."

There can be no Sort of Doubt but that a Fine *with* Proclamations will work a Diſcontinuance, and conſequently deveſt a Remainder, as well as a Fine *without* Proclamations.

Mr. Juſt. FOSTER—It is admitted "That the Deeds and "Fine ſhall operate as *one* Conveyance or Aſſurance, *if* the "Intention of the Parties be *clear* and *lawful*:" Now it was clearly the *Intention* of *Timothy Stoughton*, the Grandſon, to work a Diſcontinuance: And this Intention was certainly *lawful*. I wiſh that Gentlemen of Learning and Ingenuity would rather turn their Thoughts towards endeavouring to *ſupport* lawful Eſtates, than to ſearch out ſuch nice Diſtinctions as would *overturn* All the Settlements in the Kingdom.

Mr. Juſt. WILMOT was of the ſame Opinion.

He conſidered theſe Deeds, *as* a *Covenant to levy a Fine*: And therefore the Fine and they ought to be conſidered as *One and the ſame Aſſurance*.

This

*P. 715. *This was moſt undoubtedly a *lawful* Intention; though the *Mode* of accompliſhing it is indeed miſtaken. The previous Agreement was what the Tenant in Tail had a *Right* to do; namely, to make this Family-Settlement of the Eſtate: And the Parties concerned covenant to levy a Fine, for that Purpoſe. The *Fine* is the *principal* Act: And the *Deeds* operate to lead the *Uſes* of it.

Seymor's Caſe *materially differs* from this Caſe: For it does not appear there, that any Fine was *intended* to be levied, at the *Time* of making the Indenture of Bargain and Sale. But all theſe Tranſactions in the Caſe now before Us are to be conſidered as ONE AND THE SAME CONVEYANCE OR ASSURANCE: And the Deeds and the Fine ſhall *all* be taken *together*; And the Deeds ſhall be conſidered as leading the *Uſes* of the Fine.

Per Cur. (unanimouſly and moſt clearly)
Let the *Poſtea* be delivered to the DEFENDANT.

Lamego *verſ.* Gould.

Tr. 30 & 31 *G.* 2. *Rot'lo* 932.

THIS was an Action on the Caſe upon a Special Premiſe "to pay the Plaintiff 20 Guineas on the Death "of the Defendant's Wife;" in Conſideration of 2 Guineas in Hand paid by the Plaintiff to the Defendant. The Note was in theſe Words,—

"Memorandum—In Conſideration of Two Guineas re- "ceived of *Aaron Lamego* Eſquire *&c*; I promiſe to pay "him 20 Guineas, upon the Deceaſe of my preſent Wife, "*Anne Gould*."

The only Queſtion now made was "Whether this Con- "tract was *uſurious*;" (the Woman, at the Time of making it, being then 70 Years of Age.)

Mr. *Gaſcoigne*, for the Plaintiff, argued that it was not ſo.

The Statute of 12 *Ann. c.* 16. only ſays "No Perſon "ſhall take above the Value of Five Pounds, for the *For-* "*bearance* of One Hundred Pounds for a Year; and ſo, "after that Rate, for a greater or leſſer Sum, or for a "ſhorter or longer Time;" in Pain that all Bonds and Contracts ſhall be void.

Now

* Now here is *no Forbearance*; nor any *Certainty* of receiving either Principal or Intereſt: It is a MERE CONTINGENCY, and is like the Caſe put in *Cro. Eliz.* 643. in the Caſe of *Button* v. *Downham*, of a "Wager betwixt "Two, to have 40 *l.* for 20 *l.* if One be alive at ſuch a "Day:" Which, as there holden, is *not Uſury*. * P. 716.

Lord MANSFIELD ſtopt him, under a Doubt how it is poſſible to *come at* this Queſtion about *Uſury*. For here is nothing at all ſtated about the *Loan* of Money: It might, for aught that appears to the contrary, be a *voluntary Gift*, to be made to him upon this Event. The Matter of *Uſury* was never thought of at the Trial.

Mr. *Gaſcoigne*—The Truth of the Fact was, really, RUNNING the Life of the Plaintiff's *Horſe*, againſt that of the Defendant's *Wife*; And nothing more.

Mr. Juſt. DENISON—We can *not intend* this to be an *uſurious* Contract, (which is a Crime) For which, He cited 1 *Lutw.* 273. *Yeoman* v. *Barſlow*. It is a *fooliſh* Bargain; but not uſurious. Here are *no Facts ſtated*, upon which We can ſay it is *uſurious*.

Mr. Juſt. FOSTER and Mr. Juſt. WILMOT—*ad idem*.

And Mr. Juſt. WILMOT added, that the *true Diſtinction* was laid down in that Caſe in *Cro. Eliz.* 643. between a *real bona fide* WAGER, not at all * intended as a Loan; and a Tranſaction which is *really* an uſurious LOAN, but *diſguiſed* as a Wager, with Intent to have a *Shift*. * *V.* 1 *Lutw.* 464, 465, 466. *Geang* v. *Swaine*.

Per Cur. unanimouſly,
Let the *Poſtea* be delivered to the PLAINTIFF.

Tudway *verſ.* Bourn.

THIS was a Caſe from the Court of Chancery.

Elizabeth Collins, by her Will, gave a Legacy of 200 *l.* to One *Coward*, then a *Bankrupt*; Whoſe *Certificate* had, at the Time of her Death, been ſigned by $\frac{4}{5}$ of his Creditors in Number and Value, and alſo by the Commiſſioners, but the Teſtatrix's Death happened *before* its being CONFIRMED *and* ALLOWED by the Lord Keeper.

The Commiſſioners, ſoon after her Death, and after *Coward's* Death, and *before the Allowance* of the Certificate, aſſigned this Legacy to the Defendant *Bourn*, for the Uſe of the

* P. 717. * the Creditors: AFTER *which*, the Certificate was confirmed and allowed by the Lord Keeper, without Oppoſition. Before the Allowance of the Certificate by the Lord Keeper, the Bankrupt Himſelf died; having made *Tudway*, the now Plaintiff, his Executor.

Tudway, the Bankrupt's Executor, brought his Bill in Equity againſt the Executor of the Teſtatrix and againſt *Bourn* the Aſſignee of the Commiſſioners: Claiming this 200*l.* Legacy, as belonging to the *Bankrupt*, by Reaſon of his Certificate's having been ſigned before the Death of the Teſtatrix, and afterwards allowed and confirmed by the Lord Keeper.

But the Creditors inſiſted that it belonged to *them*; as it was aſſigned to their Uſe and Benefit, by the Commiſſioners, *before the Allowance and Confirmation* of the Certificate by the Lord Keeper.

The Queſtion referred to this Court, was "Whether it "belonged to the *Bankrupt's* EXECUTOR, or to his *Cre-*"*ditors.*"

Mr. *Gould* argued for the Plaintiff, (the Bankrupt's Executor.) *Bankrupts*, He ſaid, were originally conſidered as *Criminals*. The Statute of 4, 5 *Ann. c.* 15. was the firſt Act of Parliament which was made for their Benefit: And by this Act, the * *Commiſſioners* ONLY (without the Creditors) were to ſign the Certificate: Which was to be allowed by the Lord Chancellor or Keeper unleſs &c. Then the 5 *Ann. c.* 22. added the *Creditors*; *viz.* four fifths in Number and Value. And 5 *G.* 1. *c.* 24. continued it upon the ſame Foot. But 5 *G.* 2. *c.* 30. directs that the Commiſſioners ſhall not ſign it, † *till after* the Creditors have ſigned, and Affidavit be made thereof &c.

* *V. Sect. penult.* of that Act.

† §. 10.

No Objection, but for *Fraud*, or for *unfairly obtaining it*, will lie againſt it before the Lord Chancellor or Lord Keeper: And if *no ſuch* Objection is then made, the Allowance and Confirmation will RELATE TO THE ORIGINAL DATE of it, and will operate *as a* RELEASE from the Creditors.

It is like the Inrolment of Deeds of Bargain and Sale: Which has ſuch Relation. 2 *Inſt.* 674, *Hob.* 165. And conſequently the Allowance *over-reaches* the Aſſignment made to *Bourn*, by the Commiſſioners.

It is alſo like the Surrender of Copyholds into the Hands of a Tenant of the Manor who dies before Preſentment. He cited a Caſe in *Mich.* 17 *G.* 2. in Chancery, *Bromley* v. *Child*. A Commiſſion of Bankruptcy had iſſued againſt Sir *Stephen*

* *Stephen Evans*, in 1711. The whole Debts were received, with Intereſt to the Time of the Commiſſion. The Certificate was not *allowed* till *after the Death* of Sir *Stephen Evans*; when there was a Surplus of 35000 *l.* in the Aſſignee's Hands. The Queſtion was concerning the Intereſt which accrued ſubſequent to the Date of the Commiſſion: To which Time, the Certificate diſcharged him. Lord *Hardwicke* held that it was *well allowed*, though after the Bankrupt's Death: And he ſaid the End of requiring the *Chancellor*'s Allowance of the Certificate was to prevent Surprize; and that it takes its *Effect*, (when allowed) *from the Signing of it by the Creditors*. * P. 718.

Mr. *Norton*, *contra*, argued that The Bankrupt can not be intitled to *ſubſequent* Effects, come to him after his Bankruptcy and *after the Signing* of his Certificate by the Creditors and Commiſſioners, but *prior to its Allowance* by the Lord Chancellor or Lord Keeper.

Till the Statute of 4, 5 *Ann.* the Bankrupt's Perſon and Goods continued *always* liable to his Creditors. And the Bankrupt ought to be holden *ſtrictly* to the bringing himſelf *within the latter* Acts, that have been mentioned; by ſhewing that he has performed *All* the Requiſites of them.

Now the Allowance of the Certificate by the Lord Chancellor or Keeper is the moſt *eſſential* Part of thoſe Requiſites. The Creditors are not confined to the particular Objections mentioned by Mr. *Gould*; but are at Liberty to make *any Sort* of Objections to ſuch Allowance: And as well Creditors who *have* ſigned, as thoſe who have not ſigned, may be heard againſt the Allowance. For the Act ſays "*Any* Creditors" may "object to it:" And they are *not* confined by any reſtrictive Words whatſoever, to Matters of *Fraud* and *Unfairneſs*; but left quite * at large. * *V.* 5 *G.* 2. *c.* 30. §. 10.

Lord MANSFIELD—Certainly they are *not* ſo confined, either by Law, or by Practice: And *any* Creditor whatſoever may then object to the Allowance. And the Allowance has been ſometimes refuſed, and ſometimes adjourned, even where there has been *no* Oppoſition. Many Years may intervene between the Signing, and the Allowance of the Certificate; And large Effects may, in the mean Time, come to the Bankrupt: And the *future Allowance* ought not to over-reach them.

Here, the Commiſſioners had *actually aſſigned* this Legacy: and for *that* Reaſon, the Creditors might not perhaps think it worth their while to object to the Certificate.

* P. 719. * It is not like the Relation of a Bargain and Sale, or the Surrender of a Copyhold; to which, it has been compared. Poſſibly, in this Caſe, the Money may have been actually *divided out*: And it would be very unreaſonable, that all the Creditors ſhould *refund* their Dividends.

Mr. Juſt. FOSTER was of the ſame Opinion: But He did not proceed to declare it at large, neither did the Other two Judges declare theirs; becauſe, it being a Caſe out of Chancery, The Judges of this Court were to give a Certificate. And immediately after this Argument.

The COURT certified, as follows—

Having heard Counſel on both Sides, upon this Caſe, (which the Parties did not apply to be ſet down in the Paper, to be argued, ſooner than this Term,) We are of Opinion that the ſaid Two hundred Pounds veſted in the *Aſſignee* of the Bankrupt, and now belongs to him, for the *Benefit* of the Bankrupt's CREDITORS.

Monday, 29th January 1759.

Rex *verſ.* Fielding Eſq;

UPON ſhewing Cauſe againſt an *Information* which had been moved for by one Mr. *Barnard*, againſt the Defendant for a Miſdemeanor committed by him in his Office of a *Juſtice of the Peace*; relating to the Committing and Detaining *William Barnard* (the Son) in Priſon, *&c*, on a *verbal* Charge by the Duke of *Marlborough*, "that this "Young Man had ſent Him threatening Letters *&c.*"—

Mr. Serj. *Davy*, on Behalf of the Defendant, objected to the Proſecutor's proceeding any further in this *Criminal* Application, till He had *previouſly made his* ELECTION "Whether to proceed in this *Criminal* Method, Or in a "CIVIL *Action* which he had actually commenced."

Mr. *Norton* for Mr. *Barnard* the Proſecutor, anſwered, that this Caſe was quite *different* from *Common* ordinary Caſes; becauſe it was abſolutely neceſſary here, as the Defendant was a Juſtice of Peace, to give *Notice of*, and even actually to *commence* the Civil Action againſt the *Juſtice of Peace*, *within Six Months* after the Time when the Cauſe of Action aroſe: Which particular Circumſtances, he ſaid, was the only Reaſon of their acting thus. And he alledged that

* that they had no Intention to proceed *both* Ways; And offered to *relinquiſh the Civil Action*, IN CASE the Court SHOULD *grant the Information.* * P. 720.

But The whole COURT were of Opinion that He ought to make this *Election* DIRECTLY, and *before* they entered into the Criminal Complaint: For that this was the *conſtant Rule*; and the particular Circumſtance of the Civil Action being confined to be brought within Six Months, made *no Sort of Difference.*

The *Juſtice* of the Thing equally required, they ſaid, in *this* Caſe as well as in the *Common* Caſe, that the Defendant ſhould not be called upon in a Criminal Way, by *this diſcretionary Method*, of an *Information*, which would oblige him to *diſcover* the Matter of his Defence and his Evidence; unleſs the Proſecutor would give up the Right which he might otherwiſe have to make Uſe of this very Diſcovery of the Defendant's Evidence, *againſt* the Defendant, in his *Civil* Action: Which would be giving him a moſt *unfair and unreaſonable Advantage* over the Defendant.

They added, That *if* the Proſecutor had proceeded in the Method which he had a ſtrict and undeniable *Right* to proceed in, namely, by way of *Indictment*; and if ſuch Indictment had been actually *found:* Yet the Attorney General would (upon Application made to him) have granted a *Nolle proſequi* upon ſuch Indictment, in caſe it appeared to Him that the Proſecutor was determined to carry on a *Civil* Action at the *ſame Time.* And if this be ſo, where the Party is proceeding in a Method which he had a ſtrict *legal Right* to proceed in; Surely it is much more reaſonable for this Court to refuſe to give him this *extraordinary* Aſſiſtance (which they ought to diſpenſe with Caution and Diſcretion,) unleſs he would firſt conſent to *wave* the Civil Action which he had commenced for the very ſame Matter.

Mr. *Norton*, nevertheleſs, ſtruggled extremely had, to *diſtinguiſh* this Caſe (of being thus *fixed to* 6 *Months* for bringing the Civil Action,) from the *Common* Caſe, where the Proſecutor was *not at all reſtrained* in Time: And he remonſtrated (with great Vehemence) againſt laying down this as a GENERAL *Rule*; as it might be a great Prejudice to Parties injured by Juſtices of Peace, who often-times might not be able completely to obtain any Remedy by Way of Information, *within* the 6 Months.

He was anſwered—"That the *preſent* Application for "an Information was not made near *ſo early* as it *might* "have been: Which was the *Proſecutor's own Laches.*"

* P. 721. * Mr. *Norton* acknowledged that *if* this was really the Caſe, it would materially weaken his Argument as to *this particular* Caſe: And, in fine, He deſired Time to adviſe Whether they ſhould inſiſt upon their Civil Action, or not. Whereupon it was *adjourned* from *Wedneſday* the 22d of *November*, to the *Saturday* following.

And then the Proſecutor's Counſel agreed to *diſcontinue* their Civil Action, and proceed upon the Criminal Rule: Which they accordingly did, till it grew ſo late in the Day that the Court was obliged to *adjourn* it to the *Monday* following.

The Caſe then proceeded: But ended in an Adjournment to the preſent *Hilary* Term, in order to get further Elucidation of Facts, by procuring the Affidavits of the Earl of *Litchfield* and Mr. *Pierce*, who (though Both preſent) had not made any Affidavits at all hitherto.

On *Thurſday* the firſt Day of this Term, this Matter came again before the Court; the Earl of *Litchfield*'s and Mr. *Pierce*'s Affidavits being then obtained: And being then read, the Counſel confined themſelves to Obſervations, upon *them*; All *other* Circumſtances having been fully diſcuſſed before.

CUR' ADVIS.

The COURT now delivered their Opinion, by the Mouth of the Chief Juſtice. In which Opinion, Lord *Mansfield* declared Himſelf and his Brothers *Foſter* and *Wilmot* to be unanimous: But He ſaid, that His Brother *Deniſon*, not happening to be preſent at the Time of the Motion and Defence, had a Delicacy in forming an Opinion from the mere Reading of the Affidavits, without having heard the Obſervations which the Counſel on both Sides had made upon them; and for that Reaſon, declined interfering in the Matter.

His Lordſhip went through the ſeveral Parts of the Charge (which conſiſted of no leſs than ſeven Particulars) and alſo of the Defence, and the ſeveral Affidavits in Support of both, with the utmoſt accuracy and exactneſs; and examined them moſt minutely, in Order to diſcover whether Mr. *Fielding* had acted with a bad and oppreſſive Intention; and whether the Perſons complaining of his Behaviour had been *Sufferers*, or received any *Injury* or *Inconvenience*, in *Conſequence* of it: (For it was agreed that it was not, in two or three of its Parts, ſuch as could be *ſtrictly juſtified.*)

Upon the whole, They were unanimous in Opinion, That the main and principal Charge which was the Ground and Foundation of the Reſt, and indeed the Key to the whole Nature and Complexion of Mr. *Fielding*'s Behaviour, appeared

* peared to be *falſe in Fact* and quite *miſrepreſented* to the Court by *Barnard* the Father and *Barnard* the Son; and that the Juſtice of Peace appeared to have acted in this Affair, *without any bad* or *oppreſſive* or *injurious Intention*, though (in ſome Reſpects) *irregularly:* And therefore, though the preſent Complaint appeared to be ſo ill grounded, that the Complainants deſerved to be *puniſhed in Coſts* for making it; Yet as the Juſtice had made the Commitment without previouſly taking the Duke of *Marlborough's Oath*, and had alſo neglected to take his Grace's *Recognizance* to proſecute, (both which Parts of his Conduct were irregular,) He had no right to *receive* Coſts. * P. 722.

The *Rule* therefore was expreſsly directed to be taken thus—It is *Ordered* that the Rule made "That *John Fielding* "Eſq; and *George Box* ſhould ſhew Cauſe why an Infor- "mation ſhould not be exhibited againſt them for certain "Miſdemeanours," be diſcharged: But, in regard to the Warrants of Commitment and Detainer of the ſaid *William Barnard*, made by the ſaid *John Fielding* Eſq; This Court doth *not* think fit to diſcharge the ſaid Rule, with *Coſts* to be paid to the ſaid Mr. *Fielding*.

Douglaſs, Widow and Adminiſtratrix, *verſ.* Yallop Eſq;

A Neglect of entering Judgment, and a Loſs of the Roll, having been ſufficiently ſhewn to the Court;

A Rule was made, "That the Clerk of the Judgments "ſhall *ſign a new Roll*, whereon is entered the Judgment "ſigned in this Cauſe, in *Michaelmas* Term 1729; And "that the ſame be numbered as Roll 256, and filed "amongſt the Rolls of that Term; A Special Entry being "firſt made, expreſſing the *Day of docketting* the ſame:" And it is further Ordered, "that this Judgment ſhall not "be made Uſe of againſt the *Adminiſtrator* of the De- "fendant."

Note. Lord MANSFIELD intimated, that it very much concerned the *Chief Clerk*, to take care that Judgments be *actually entered up* upon the Roll in due Time, and *docketted:* For that, after he has received his Fees for making ſuch Entry, He would be liable to an Action upon the Caſe, to be brought by a Purchaſer who ſhould have become liable to it, and had ſearched the Roll without finding it entered up. And He ſaid that the Attorney who had undertaken to do this, and neglected it, would be liable indeed to the Chief Clerk: But ſtill, the *Chief Clerk* would be liable to the *Purchaſer* who had ſuffered by this Neglect.

N. B. The

* P. 723. * *N. B.* The preſent Courſe is, for the Attorney for the Plaintiff to undertake to make this Entry upon the Roll: For doing which, the Chief Clerk (who is intitled to 8 *d. per* Sheet) allows him 5 *d. per* Sheet. So that the Attorney in this Caſe, acts *as* one of the *Clerks of the Chief Clerk:* Which would render the *Chief Clerk* liable to the *Party's Action*; though the *Attorney* would be *anſwerable over* to him. (In Fact, the Attornies are very apt to be negligent in bringing in theſe Entry Rolls.)

(The *Chief Clerk*, perceiving the Inconvenience to which this Practice renders him liable, determines to put the Matter upon a *ſafer* Foot, for the future.)

Wedneſday 31ſt January 1755.

Rex *verſ.* Mayor Bailiffs and Common Council of the Town of Liverpool.

THIS came on, in the Crown-Paper, upon the Return to a *Mandamus* to reſtore *Joſeph Clegg* into the Place and Office of one of the *Common Council* of the ſaid Town.

Return—That the Town of *Liverpool* is and from Time immemorial has been an ancient Town and Borough *&c*, conſiſting of a Mayor and two Bailiffs and a Common Council, *&c*. That they were incorporated by Letters Patent dated 4th *July* 2 *Car.* 1: Which Letters Patent they accepted and agreed to. Then they ſet forth other Letters Patent, of 26th *September* 7 *W.* 3. confirming their former Franchiſes, and further conſtituting granting and declaring that thence-forward and for ever there might and ſhould be, within the ſaid Town, the Officers and Miniſters following; to wit, 41 honeſt and diſcreet Men, of the Burgeſſes of the Town aforeſaid, who ſhould be and be called the *Common Council* of the ſaid Town *&c:* And the ſame King, by the ſaid Letters Patent, named the firſt and then modern Common Council of the ſaid Town, *to continue* in the Office of Common Council of the ſaid Town *ſo long* as they ſhould behave themſeles well; UNLESS ſome or any of them ſhould happen, for a REASONABLE Cauſe, to be removed, BY *the Mayor Bailiffs and Common Counſel* of the ſaid Town or the greater Part of them for the Time being. Which ſame Letters Patent of King *William* the 3d the then Mayor Bailiffs and Burgeſſes of the ſaid Town in due Manner accepted and agreed to: And ever ſince the granting of the ſame Letters Patent, the Common Council of the ſaid Town have of Right conſiſted, and have uſed and of Right ought to conſiſt of 41 Perſons and no more.

Then

Then they admit *Joſeph Clegg*'s Election and Admiſſion * P. 724 into the ſaid Office of One of the ſaid Common Council, as by the Writ is ſuggeſted.

But they alledge, that from Time whereof the Memory of Man is not to the contrary, the Mayor Bailiffs and Common Council of the ſaid Town for the Time being, or the greater part of them in Common Council aſſembled within the ſame Town, *have of Right removed*, and during all the Time aforeſaid have uſed and been accuſtomed and of Right ought to *remove* any One or more of the Common Council of the ſaid Town, from the Place and Office of One of the Common Council of the ſaid Town, *for any* REASONABLE *and* LAWFUL *Cauſe*; And that the Perſon or Perſons *ſo* removed therefrom, have accordingly been and continued abſolutely and effectually diſcharged and removed from the ſaid Place and Office.

They further certify and return, That the Mayor Bailiffs and Burgeſſes of the ſaid Town are and Time immemorially have been *ſeiſed* in their Demeſne as of Fee, in their Corporate Right and Capacity, of divers Meſſuages Lands Rents and Hereditaments, and lawfully intitled for themſelves and their Succeſſors to many large and valuable Tolls Duties and Cuſtomary Payments; And alſo now are, and for 50 Years and upwards now laſt paſt have been lawfully *poſſeſſed*, in their Corporate Right as aforeſaid, of divers other Lands and Tenements for certain long Terms of Years yet to come and unexpired; And that the ſeveral *Eſtates Hereditaments Duties Rents Revenues* and *Poſſeſſions* of and belonging to the Mayor Bailiffs and Burgeſſes of the ſaid Town, in their Corporate Right and Capacity as aforeſaid, now are and at the Time of the Removal of the ſaid *Joſeph Clegg* therein after mentioned were, and for a great Number of Years now laſt paſt have been of *great yearly Value*, to wit, of the yearly Value (together) of 2000 *l. and upwards*; And that the Office of one of the Common Council of the ſaid Town now is and during all the Time aforeſaid hath been an Office of *great Truſt and Power*, with reſpect to the *Management*, *Receipt*, *Control*, and *Application* of the *Iſſues*, *Rents* and *Profits* of the Eſtates Hereditaments Duties Revenues Tenements and Poſſeſſions of and belonging to the Mayor Bailiffs and Burgeſſes of the ſame Town, and in the *appointing* of proper Officers to collect the ſame.

Then the Return proceeds to alledge, that before the Removal of the ſaid *Joſeph Clegg* in the Return after mentioned, the ſaid *Joſeph Clegg* ſought his Trade of Living, by buying and ſelling; and *became and was a* BANKRUPT within the Meaning and Intent of ſome or one of the Statutes made and

in

* P. 725. * in Force concerning Bankrupts; And that afterwards, and before the ſaid Removal of the ſame *Joſeph Clegg* in the Return after mentioned, to wit on the 27th Day of *July* in the Year of our Lord 1756, a certain COMMISSION *of Bankruptcy in due Manner* ISSUED *againſt the ſaid Joſeph Clegg*, under His Majeſty's Great Seal of *Great Britain*, bearing Date at *Weſtminſter* the ſaid 27th Day of *July* in the 30th Year of his Reign, directed to *R. T. &c*, (the Commiſſioners in that Commiſſion named,) authorizing them *&c*, (as therein mentioned;) And that afterwards, and before the Removal of the ſaid *Joſeph Clegg* in the Return after ſpecified, that is to ſay, on the 5th Day of *Auguſt* in the Year laſt mentioned, the ſaid *R. M R. E. and R. R.* being the greater Part of the Commiſſioners in the Commiſſion named, did duly put the ſame Commiſſion in Execution, and by Virtue thereof in due Manner FOUND *and* DECLARED *the ſaid Joſeph Clegg* TO BE A BANKRUPT within the true Intent and Meaning of ſome or one of the Statutes made and in Force concerning Bankrupts; And that the ſaid *Joſeph Clegg* afterwards, and before his Removal in the Return after mentioned, did (purſuant to public Notice for that Purpoſe given in the *London Gazette*,) ſubmit himſelf to the aforeſaid Commiſſion ſo iſſued againſt him as aforeſaid; And that the ſaid *Joſeph Clegg* at the *Time of his Removal* in the Return after mentioned *had not nor hath yet* OBTAINED from the above mentioned Commiſſioners in the ſaid Commiſſion named, or from the greater Part of them, a CERTIFICATE of his having conformed himſelf to the Directions of the Statutes or any of them made and in Force concerning Bankrupts: Whereby the ſaid *Joſeph Clegg then* BECAME and *was* and from thenceforth hitherto *hath been and ſtill is* UNFIT for the ſaid Place and Office of one of the Common Council of the ſaid Town, ſo being an Office *of great Truſt and Power* with reſpect to the Management Receipt Control and Application of the Iſſues Rents and Profits of the Eſtates Hereditaments Duties Revenues Tenements and Poſſeſſions of and belonging to the Mayor Bailiffs and Burgeſſes of the ſaid Town as aforeſaid.

The Return proceeds—That afterwards and before the Removal of the ſaid *Joſeph Clegg* in the Return after mentioned; (that is to ſay) *on the 1ſt Day of February* in the Year of our Lord 1758, the then Mayor and Bailiffs and the then greateſt Part of the then Common Council of the ſaid Town, that is to ſay, 26 of the ſame Common Council, to wit, *W.G. &c*, being all of them then of the Common Council of the ſaid Town, whereof the then Mayor and Bailiffs were Three, at *Liverpool* IN DUE MANNER *met and aſſembled in Common Council* within the ſaid Town of *Liverpool*, in the Council-Chamber of the ſaid Town, and then and there *duly held a Common Council* of the ſaid Town, CONCERNING *divers Matters and Buſineſſes relating to the ſaid Town and the good Regulation and Government thereof*; And that

* that the ſaid *Joſeph Clegg* was *then* and *there* PRESENT * P. 726.
at that Aſſembly; And that in the *ſame* Aſſembly ſo held and met in Common Council as aforeſaid, an INFORMATION *and* CHARGE *were in due Manner exhibited* to *that* Aſſembly, againſt the ſaid *Joſeph Clegg*, " *of his aforeſaid* BANKRUPT-" CY, and of the Iſſuing of the ſaid COMMISSION of " Bankrupt againſt him; and of his NOT *having then ob-*" *tained* his CERTIFICATE as aforeſaid;" as a REASONABLE *and* LAWFUL *Cauſe* for the Removal of the ſaid *Joſeph Clegg* from his aforeſaid Office of One of the Common Council of the ſaid Town, ſo being an Office of great Truſt and Power as aforeſaid. And that the ſaid *Joſeph Clegg* had THEN AND THERE, *perſonal Notice* of the ſaid Information and Charge againſt him; and HEARD *the ſame made* againſt him; and was *then and there aſked* by that Aſſembly ſo met in Common Council as aforeſaid, " Whether he the " ſame *Joſeph Clegg* was the Perſon againſt whom the ſaid " Commiſſion of Bankrupt had ſo iſſued as aforeſaid;" And " Whether he the ſaid *Joſeph Clegg* was then a Bankrupt, " and had obtained his Certificate in that Behalf, or not:" And thereupon, the ſaid *Joſeph Clegg then and there* CONFESSED and ACKNOWLEDGED to the *ſame* Aſſembly ſo met in Common Council as aforeſaid, " That he the ſaid " *Joſeph Clegg was the Perſon* againſt whom the ſaid Com-" miſſion of Bankrupt had ſo iſſued as aforeſaid: And that " he *was then a Bankrupt*, and had *not then obtained his Certificate* in that Behalf."

Then the Return ſays, That the ſaid *Joſeph Clegg having ſo confeſſed the Truth of the above mentioned Charge* againſt him, as aforeſaid, He the ſaid *Joſeph Clegg* was then and there *further aſked* by the ſaid Aſſembly of the Mayor Bailiffs and the greater Part of the Common Council of the ſaid Town, " *What he the ſaid Joſeph Clegg had to ſay in his De-*" *fence*, Why he ſhould not be removed from the ſaid Of-" fice of One of the Common Council of the ſaid Town for " the Cauſe aforeſaid;" And the ſaid *Joſeph Clegg* did NOT *then, or at any other Time* before his Removal in the Return after mentioned, *deſire any* FURTHER *Time* to be allowed him, to make his Defence to the Information and Charge aforeſaid: And the ſaid *Joſeph Clegg did not*, either then or at any Time before his Removal in the Return after mentioned, *alledge* or *offer* to *that* Aſſembly ANY CAUSE WHATSOEVER why he ſhould not be diſcharged and removed from his ſaid Place or Office of One of the Common Council of the ſaid Town as aforeſaid. And *being rendered and become by his aforeſaid Bankruptcy* and *by his not having obtained his Certificate* in that Behalf, UNFIT for the ſaid Place or Office of one of the Common Council of the ſaid Town, *being an Office* of great Truſt and Power as aforeſaid, It was then and there moved in the ſaid Aſſembly, *in the Preſence and Hearing of the ſaid Joſeph Clegg*, by one of the Common Council ſo aſſembled as aforeſaid, that is to ſay, by *F. G.*

&c.,

* P. 727. * &c, "That the ſaid *Joſeph Clegg* ſhould be removed from "his ſaid Place or Office of one of the Common Council of "the ſame Town, for the Cauſe aforeſaid;" Whereof the ſaid *Joſeph Clegg* had then, and before his Removal from the ſaid Office in the Return after mentioned, due Notice. And the ſaid *Joſeph Clegg did not*, then or at any Time before his ſaid Removal therefrom in the Return after ſpecified, *alledge or offer* to the *ſame* Aſſembly *any Cauſe whatſoever* why he ſhould not be removed and diſcharged from the ſaid Place or Office. *Wherefore* the ſaid Aſſembly ſo *met* in Common Council as aforeſaid, and conſiſting of the ſaid then and now Mayor and Bailiffs and the greater Part of the then Common Council of the ſaid Town as aforeſaid, having heard and duly weighed and conſidered the Information and Charge aforeſaid, and what was alledged and admitted by the ſaid *Joſeph Clegg*, did *then and there* duly diſcharge and remove the ſaid *Joſeph Clegg* from the ſaid Place and Office of One of the Common Council of the ſaid Town, FOR THE CAUSE AFORESAID: And by Reaſon thereof, he hath ever ſince remained and ſtill is and continues removed and diſcharged therefrom. And *therefore* they cannot reſtore Him or cauſe him to be reſtored, as by the ſaid Writ they are commanded.

Mr. *Winn*, on Behalf of *Clegg*, the Proſecutor of the *Mandamus*, Objected to this Return: To which, he took two Exceptions; or in Effect, three, as the former was divided into two diſtinct Parts.

1ſt. The Aſſembly who amoved him was *not legally* CONVENED, for want of NOTICE, either to the *Reſt* of the Common Council, or to *Mr. Clegg himſelf*; who ought to have had Notice of it, both as one of the Members compoſing that Body, and alſo as the Member to be amoved.

2d. Objection. The CAUSE of Amotion is inſufficient.

Firſt—Notice ought to have been given to *all* the Members; And conſequently *Mr. Clegg* ought to have had Notice, as He was *One of the conſtituent Members* of this Corporate Body. For EVERY individual *Member* of the Body ought to be *ſpecially* ſummoned, previous to the *Amotion* of any Member: A *General* Summons being always inſufficient, *wherever any extraordinary* Buſineſs is to be done.—Whereas this Return does *not ſhew any* Summons *at all*, to *any* of the conſtituent Members: And it is incumbent upon them to *ſhew* their own Juriſdiction; as it is a ſummary One, founded upon Charter, and not upon the Common Law.

The Words "in *due* Manner met and aſſembled &c," are only *a Concluſion of Law*: But the Court can *not intend* any *Facts* not alledged; For Returns muſt be taken *ſtrictly*. "Nothing is to be intended in a Return to a *Mandamus*,"

is

* is the Declaration of Ld. Ch. J. *Holt*, in 1 *Shower* 282. * P. 728. *Rex* v. *Evans*: Where the Court would not make even a very obvious Intendment. And ſo it is, in *all ſummary* Juriſdictions: As upon the Game-Laws, and ſuch like Caſes. So, upon Indictments alſo: As in 5 *Mod.* 96. *Rex* v. *Harper*; which was an Indictment for not taking upon him the Office of Conſtable, being qualified, and having been *debito modo* elected thereto; And the Objection was that the Indictment ought to have ſet out Particularly *how* he was choſen, and that he had Notice; Or elſe, the Indictment ought to be quaſhed.

The next Objection is, "That Mr. *Clegg* Himſelf, as "the *Member to be amoved*, was *not ſummoned to anſwer* to "the particular Charge, *upon which* He was to be moved." 4 *Mod.* 337. *The City of Exeter* v. *Glide*, is expreſs, "That "he muſt and ought to have a *particular* Summons *for a* "*particular Charge*: And it is *not* ſufficient to ſummon him "*generally*; and then to alledge particular Crimes againſt "him, which he may not be prepared to anſwer." And *if* a *previous* particular Summons to Mr. *Clegg*, "To an-"ſwer the *particular Charge*," was neceſſary; his *Appearance* in the *ordinary* Courſe of his Duty will NOT *cure* this Defect.

And the very Nature of *this* Charge (of Bankruptcy) more eſpecially *requires a particular* Summons "to anſwer to "it," becauſe it depends upon a great Number of *complicated* Facts. Here, he is not charged with any *particular* ACT of Bankruptcy; Nor is it alledged, that the Commiſſion even *ſubſiſted long enough* for him to have obtained a Certificate under it.

Second Point—The CAUSE of Amotion is *inſufficient*.

It imports Nothing of *Infamy* or *Offence*, for which he was *indictable*; Nor any the leaſt Neglect of or Offence againſt the *Duty of his Office* as a Corporator. *Every Trader* is liable to Bankruptcy; which may happen to him by Accident and Misfortune, and without any *Fault* of his own. Becoming Bankrupt is a *Misfortune*, *not a Crime*: It does not even neceſſarily import *Inſolvency*; Nor if it did, would *that* diſqualify him from remaining a Corporator.

There is only one Caſe to be met with, of an Amotion for Bankruptcy: Which was in *M.* 8. *G.* 2. *B. R. Rex* v. *Mayor and Aldermen of King's Lynn*, on a *Mandamus* to reſtore one *Stephen Allen* to the Office of Common Council Man; and was in the Time of Ld. *Hardwicke*. But indeed, this particular Point did not come to be *determined*; becauſe the Return was held clearly inſufficient on *another* Foot, *viz.* for *want of Summons*, or even an *Attempt* to ſummon.

Here,

P. 729. * Here, It appears that Mr. *Clegg* was *neither an Object of their Juriſdiction*; Nor was the *Cauſe of his Amotion ſufficient.*

Therefore this Return being inſufficient, He prayed a Peremptory *Mandamus* to reſtore him to the Office.

Mr. *Clayton, contra*—Three Objections are made to this Return: *viz.*

1ſt. That it is not ſaid, that ALL the Members of this ſelect Corporate Body were *ſummoned*;

2d. That *Clegg himſelf* had not previous *particular Notice of the Charge*, which was to be made upon him;

3d. That the *Cauſe* of Amotion is inſufficient.

Anſwer, 1ſt The Corporate Body who had the Right to amove, is alledged to be "in DUE *Manner met and* "*aſſembled.*" Now this Aſſembly poſſibly *might* be upon a *Charter* Day: And *then* No Special Summons was neceſſary.

Or if in Fact it was *not duly* holden, they might have *traverſed* it: As was done in the Caſe of *Green* v. *Mayor of Durham*, *H.* 1757. 30 *G.* 2. *(V. ante, Pa.* 127*)*. There was a Caſe ſimilar to the preſent, *P.* 8 *G.* 2. *B. R. Kynaſton* v. *Mayor and Aldermen of Shrewſbury*, * Where the Facts were *traverſed* and tried. So here, *if* they were *not* duly ſummoned, or the Aſſembly *not duly* holden, they might have traverſed theſe Allegation of the Facts, and taken Iſſue.

*V. 2 Strange 1051.

The *General* Summons is *ſufficient*. I cannot find any Return which *avers* "That ALL the conſtituent Members "*were ſummoned*, or *had Notice* of the Aſſembly." And it † 9 *Ann. c.* 10. is *unneceſſary to aver it*; becauſe ſince the *Mandamus* † Act, they may traverſe it, and before the Act they might have had an Action for a falſe Return.

To the 2d Objection—(of Want of Notice to *Clegg* Himſelf,) The Anſwer is, That his *Appearance* CURED the Defect, if there was One. 2 *Salk.* 428. *Rex* v. *Mayor and Burgeſſes of Wilton*, on a *Mandamus* to reſtore *Elias Chalk* to the Place of Burgeſs, is in Point, "That where the Per-"ſon amoved has been *heard*, the Want of Summons is *no* "Objection." So it is, in Convictions upon the Game Laws. And here, Mr. *Clegg was heard*, and *admitted* all the Facts: and deſired *no further Time.*

As

* As to the 3d Objection—Here *is* a *reaſonable Cauſe* of Amotion. This is *not* an Amotion from his FREEDOM of the Corporation; but only from being One of the COMMON COUNCIL: In *which* Character, he had the *Management* of very great *Revenues* of the Corporation, *viz.* 2000 *l. per Annum*. * P. 730.

In *Rex* v. *Mayor of King's Lynn*, *M.* 8 *G.* 2. *this* Point about the Bankruptcy being a ſufficient Cauſe of Amotion, or not, was NOT * *entered into*: It went off upon the want of *Stephen Allen*'s being ſummoned, or even of any Endeavour to ſummon him.

* It was objected to, by *Allen*'s Counſel, but no farther diſcuſſed; The Court having put it upon the Counſel Who endeavoured to ſupport the Amotion of *Allen*, to anſwer, in the firſt Place, to the Want of Summons.

It is objected, "That the *particular Acts* of Bankruptcy "are not ſtated."

Anſwer—This Defect alſo (if it be any) is *cured* by his Appearance and Confeſſion "That he *was* a Bankrupt, "and had not obtained his Certificate."

Mr. *Winn*, in Reply—

1ſt. We are *not obliged* to take Iſſue upon the being "duly aſſembled." They ought to *ſhew* their own Juriſdiction: And therefore as the Aſſembly does *not appear* to have been holden upon a *Charter*-Day, they ought to have ſhewn either a *Special*, or at leaſt a *General* Summons to the *ſeveral conſtituent Members* of it.

2dly. Mr. *Clegg* could not be *prepared* to defend himſelf againſt this complicated Charge, without previous Notice; although he *happened* to be *caſually* preſent, in the Diſcharge of his General Duty to the Corporation.

3dly. It does not appear that Mr. *Clegg* was not *intitled* to his Certificate, though he had not had Time to obtain it.

And as to any *perſonal* Truſt or Power as to the Revenue of the Corporation—He was not, *as* Common Council Man, PERSONALLY to receive and diſburſe the Eſtate of the Corporation, or to finger any of their Caſh.

The Commiſſion does not at all affect him in his *Corporate* Capacity.

Lord MANSFIELD ſaid He had no Doubt at preſent: Though He would not preclude a further Argument, if the Parties ſhould not agree to his Reaſons.

It

* P. 731. * It is certainly true, He ſaid, that where an Amotion is returned, the return muſt ſet out *all the neceſſary Facts, preciſely*; to ſhew that the Perſon is removed in a legal and proper Manner, and for a legal Cauſe: It is *not* ſufficient to ſet out *Concluſions* only: They muſt ſet the *Facts themſelves* out, preciſely; that the Court may be able to judge of the Matter. And ſo it is alſo, as to the *Cauſe* of Amotion: *This* muſt be ſet out in the ſame Manner; that the Court may judge of it.

Here, Three Objections have been made.

1ſt. That ſuppoſing this *ſelect* Body of the Corporation to have Authority to remove, (and to which no Exception is taken,) and abſtractedly from the particular Cauſe of the preſent Amotion, yet it does not appear that the *Conſtituent Members* of the Body who made the Amotion were *ſummoned at all*, to this Meeting: Whereas it not appearing to be a Meeting directed by the Charter, there ought to have been a *Special*, or at leaſt a *General* NOTICE given to *each individual Member* of it, "That there was to be ſuch a Meet-"ing."

2dly. That it is alſo abſolutely neceſſary, that *Mr. Clegg*, the Perſon intended to be amoved, ſhould have had *particular Summons*, "To anſwer to the particular Charge." To which it is anſwered, "That this is *cured*, by his * *V. Poſt.* "* Appearance and * Confeſſion and not deſiring further "Time. I will ſay Nothing at all about *this* Matter; the 1ſt and 3d Objections being clear, full, and fatal.

3dly. That the *Cauſe* of Amotion is inſufficient.

Now as to the firſt. It is certain that no Summons of any of the Members is alledged in the Return: Whereas, if a *ſelect* Number of a Corporation have Power to remove, and do amove at a Meeting holden upon a *Day not directed by Charter &c*, ALL that are within Summons, muſt be ſummoned. And ſo was Mr. *Kynaſton*'s Caſe determined in *Tr.* 8, 9 *G.* 2. in this Court.

And it is not ſufficient to alledge, "That they were *duly*, "or in *due Manner*, met and aſſembled:" It ought to be *expreſsly* alledged, "that they were ALL *ſummoned*."

The Traverſe, therefore, which it is ſaid might have been here taken, would not go to the *Fact itſelf*, but only the *legal Conſequence*: And therefore they could not be obliged to traverſe, in the preſent Caſe.

There-

* Therefore this is a flat Objection. * P. 732.

As to the 2d I will ſay Nothing.

But as to the 3d Objection—*This* Point has never yet been determined.

The Caſe of *King's Lynn* turned upon the Want of Summons.

No Cauſe is *reaſonable*, unleſs it be *juſt* and *legal*: A *juſt* a *legal*, a *ſufficient*, a *reaſonable* Cauſe, All mean the ſame thing; The only Difference is in the different Epithets.

The * 3 Cauſes of Amotion of a Corporator, are (1ſt.) Offences againſt the *Duty of his Office*, as a Corporator; (2dly.) Crimes in their *own Nature* heinous and atrocious, and againſt the Offender's *general* Duty, *as a ſubject*; yet not particularly relating to his Corporate Office or Duty; and (3dly.) Such as are of a *mixt* Nature. **V. ante* 538. S. P. (rathermore at large) *Rex* v. *Richardſon*, P. 1 58. 31 G. 2. *B. R.*

Let Us therefore conſider the preſent Cauſe alledged for the Amotion, in theſe three Views.

1ſt. His mere being a Bankrupt is *no* Objection to his continuing a *Corporator*: It is no Offence againſt the *Duty of his Office*. He may become Bankrupt, *without his own Fault*. And there is no *Cenſus* requiſite as a Qualification to be a Corporator. Indeed ſome one or more of the *Conſequences* of Bankruptcy may *eventually become* a Cauſe of Amotion: But the Bankruptcy itſelf is not ſo. A Man may be able to pay above 20 Shillings in the Pound, notwithſtanding his being in Strictneſs a Bankrupt: Or he may very ſoon obtain a Certificate, after the Commiſſion has iſſued.

2dly. It is *no* Offence againſt the *Law of the Land*. Bankrupts are *not now* conſidered as Criminals; whatever the * Old Acts may intimate of this kind. A man may certainly be a Bankrupt, without being guilty of any *Crime* whatſoever; and may really be worth a large Surplus on a Balance: Sir *Stephen Evans*, and the *Woodwards*, and many Others have been Inſtances of this. **V. ante*, *pa.* 717.

And this Diſ-franchiſing for becoming Bankrupt might be made a very bad Uſe of, by Juntoes in Corporations, or under particular Circumſtances, and with particular Views. A Run upon a Man of great Fortune and Credit may be artfully managed, ſo as to reduce him to Bankruptcy. And there is no difference between a *Common-Council*-Man's becoming a Bankrupt, and an *ordinary* Freeman's becoming ſo.

As

*P. 733. * As to the Truſt and Power over the *Revenues* of the Corporation—*This* Man is only One Member of the Number of *One and Forty*, who have amongſt them, a Power of voting Corporate Acts: But he has nothing to do with the Receipt, or Truſt, or Management, or Fingering of the MONEY; nor can have any thing to do with it, unleſs the Reſt ſhould, by a Corporate Act of their *own* truſt him with it.

Therefore the having become a Bankrupt, and not having obtained his Certificate under the Commiſſion awarded againſt him, is not, of itſelf, *alone*, ſufficient to diſqualify him from being a Member of the Common Council of this Town; whatever *might* have been the Caſe, if certain eventual Conſequences had happened to follow therefrom.

Therefore the 1ſt and 3d Objections are fatal: Which renders it unneceſſary to enter at all into the Diſcuſſion of the 2d Objection, and of the Anſwer that has been given to it.

Mr. Juſt. DENISON concurred with his Lordſhip in Opinion.

This Return is by no Means a ſufficient Return. Bankruptcy *alone* is no ſufficient Cauſe of Removal. There muſt have been, in Fact, many Inſtances of ſuch Bankruptcies of Corporators. I ſuppoſe the Queſtion was never determined, becauſe the Fact of it was * never made a Queſtion.

* In the Caſe of *King's Lynn*, there were other Cauſes of Amoving *Allen*, beſides his being a Bankrupt; namely, Non-Reſidence, Abſence, and Neglect of Duty.

In the Caſe of *Lynn*, they had never even endeavoured to ſummon him: And not a Word was ſaid about the Bankruptcy, by the *Court*, on determining the Caſe.

As to the 1ſt Objection in the preſent Caſe—They ſhould have ſhewn, in their Return, *which* were their *general* Days of Meeting, fixed by the Charter. But here it is an Amotion by a Meeting of a *ſelect* Number; Who ought *Every one of them* to have Notice, when they are to proceed on *particular* Buſineſs: Whereas it is not here pretended, by any direct Allegation, that they had any Notice at all. It is ſaid indeed, "That they were in *due Manner* met and "aſſembled." But a Return ought to be *certain*; and it ought as much to be ſo, *ſince* the Act of Parliament, as before.

They were *not obliged* to traverſe this Allegation of the Meeting being "duly aſſembled:" And indeed it would have been a Traverſe of *Conſequences*, not of *Facts*.

All the Members of the ſelect Body ought to have had *particular* Notice.

As

* As to the 2d Objection—I think the † *Party himſelf* *ought* to have had previous Notice. But, however, there are many *other* Objections to the Return: And therefore I will not meddle with *that*.

* P. 734. † *V. poſt.* 738. *Rex* v. *Mayor &c, of Doncaſter.*

3dly. The *Cauſe* of this Amotion is certainly *inſufficient*. For ſurely a Man may become a Bankrupt, without being guilty of *any Offence* at all, either againſt his *private* Office and Duty of a Common Council-man, or againſt the Law of the *Land*. I have no Notion that being a Bankrupt will diſqualify a Man from being a Common Council-man or a Corporator. And the not obtaining his Certificate is an immaterial Circumſtance: It was not in his Power; or he might not have had Time to do it.

And he had not the *Management of the Revenues* of the Corporation, ſo as to have any Concern in the *collecting* them. It does not appear that he had any thing to do with fingering the *Caſh* of the Corporation; or that their pecuniary Intereſts could at all *ſuffer* by his having become a Bankrupt.

Upon the Whole therefore, it ſeems very clear that this is a bad Return, and ought to be quaſhed; and that a Peremptory *Mandamus* ought to iſſue.

Mr. Juſt. Foster declared himſelf of the ſame Opinion. They ought, He ſaid, either to have ſet out an Aſſembly upon a *Charter*-Day, or a *general* Summons to the component Members of this *ſelect* Body who amoved. He added, —I cannot go ſo far as to ſay that a *Special* Summons was neceſſary, ſetting forth the *particular* Buſineſs upon which they were to treat: But I think a *General* Summons, to every Member, was neceſſary.

As to the 2d Objection—I ſhall not ſay much upon it. But a Man ought not to be diſpoſſeſſed of his Freehold, without having a *proper* Opportunity of making a *Defence* to the Charge upon which He is removed from it. He could not be prepared in the preſent Caſe, to defend himſelf againſt *this particular* Charge: He ought to have been appriſed what it was to be. There might be an Opportunity taken, when there was a thin Meeting, and when all his Friends were abſent, who would perhaps have been preſent, if he had any Notice of *this* or even of *any* Charge againſt him.

As to the 3d Objection—The *Cauſe* of Amotion is *not* ſufficient. *Bankruptcy alone* is *not* ſo. And the not having obtained his Certificate is not at all material: He might not have had Time or Opportunity to obtain it; or it might have been oppoſed, on purpoſe.

* P. 735. * *Bankruptcy* does not neceſſarily import *Inſolventcy*. But *Inſolvency itſelf* is no Cauſe of Amotion, where the Corporator is *not intruſted* with the Receipt of the Corporation's *Money*. And here he is not intruſted with a Penny of their Money: It is not alledged that he had any thing to do with their *Caſh*.

Therefore, upon the whole, This Return is bad, and ought to be quaſhed; and a Peremptory *Mandamus* ought to go.

Mr. Juſt. WILMOT was of the ſame Opinion.

He confined himſelf, (as Lord *Mansfield* had done,) to the firſt and third Objections, only.

1ſt. If the Aſſembly is not holden upon a *Charter*-Day or a *general* Day of Meeting, there muſt be a previous Summons to *every* Member; either *General* or *Special*: I rather think, it ought to be *Special*; that every Member may come *prepared*, and have an Opportunity to give his Reaſons to his Brethren; which may perhaps alter their Opinion. But clearly there ought to be *a* previous Summons, *either* general, *or* ſpecial; and this, to every individual Member.

The Allegation of their being "DULY *met and aſſembled*," is a *Complication* of Fact and Law; and therefore *not properly traverſable*: The *particular Facts* ought to be alledged upon the Record. The Act of 9 *Ann. c.* 20. makes no Difference at all: It is juſt the ſame *ſince*, as it was before this Act.

As to the 3d Objection—*Bankruptcy alone* is *no* ſufficient Cauſe of Amotion. He had nothing to do with the *Money* of the Corporation. Indeed *no Inſolvency* at all appears: Nor, if it did, is it an *Offence*. Bankruptcy alone is no Offence either againſt the Duty of his *Office* as a Corporator, nor any Offence or Crime rendering him infamous at *Common* Law.

Therefore this Return is inſufficient, and ought to be quaſhed; And there ought to be a peremptory *Mandamus*.

Per Cur. unanimouſly,
Let there be a PEREMPTORY MANDAMUS.

RULE to quaſh the Return; and that a Peremptory *Mandamus* do iſſue.

Bailey

* Bailey *verſ.* Dillon.

* P. 736. *Thurſday* 1ſt *February* 1759.

MR. *Williams* ſhewed Cauſe why the Defendant ſhould not be *diſcharged upon* COMMON *Bail.*

The Caſe was this—The Defendant, *being indebted to the Plaintiff*, became a *Bankrupt*. The Commiſſion iſſued on the 7th of *May* 1754. The Bankrupt obtained his *Certificate:* Which was ſigned on the 30th of *Auguſt* 1754, and allowed in the *September* following. In *September* or *November* 1755, the now Plaintiff, who was One of this Bankrupt's Creditors as aforeſaid, and did not appear to have come in under the Commiſſion, produced to the Defendant an Account between them (prior to the Commiſſion;) upon which Account, there was a Balance due to the Plaintiff from the Defendant, of 74 *l.* and upwards, remaining *due at the* TIME *of the Bankruptcy*. The Defendant deſired Time to examine it: And then acknowledged that this Balance was due to the Plaintiff, and PROMISED "*to pay* it to the Plaintiff, WHEN *He ſhould* "*be* ABLE."

So that the GENERAL *Queſtion* ariſing upon this Caſe, will hereafter be "Whether a Perſon indebted to Another, "and afterwards becoming *Bankrupt*, and then being *regu*- "*larly diſcharged*, by having duly conformed himſelf to "the Bankrupt-Acts, and having obtained his Certificate; "but afterwards making a *new Acknowledgment* of the ſame "Debt being due, and alſo a *new* PROMISE *to pay it*, ſhall "or ſhall not be LIABLE *to the Payment* of it:" But

The *particular* Queſtion *now* before the Court was ſingly, "Whether he ought to be *diſcharged* upon COMMON *Bail*, "or *holden* to SPECIAL *Bail*." For this alone was the Motion which Mr. *Norton* had made, and againſt which Mr. *Williams* now ſhewed Cauſe.

Mr. *Williams* argued, on Behalf of the Plaintiff, That this is a *new Debt*, founded upon a Promiſe made on a good and ſufficient Conſideration, *viz.* on a CONSCIENTIOUS *Obligation.*

He compared it to Caſes of new Promiſes made after the Expiration of the Six Years; which ſhall *revive* Debts barred by the Statute of Limitations: As that of *Dean* v. *Crane*, in 6 *Mod.* 309; and *Andrews* v. *Brown et Ux*,' in *Precedents in Chancery* 385. And ſo, the Bankrupt Acts muſt be taken favourably for Creditors.

A much ſtronger Inſtance, is the Caſe of an Infant, who *after full Age*, ratifies a Contract for Goods, not being

* P. 737. * Neceſſaries, by his Promiſe to pay for them. For which, he cited *Southerton* v. *Whitlock*, in 1 *Strange* 690: Where Ld. *Raymond*, at *Guildhall*, held "that the Infant was *bound*, "in ſuch a Caſe." Yet the Infant was full as much diſcharged of the Contract, in that Caſe, as this Bankrupt was, in the preſent Caſe.

**V. ante* 717. But * this Act which gives the Diſcharge by Certificate, was made for the *Benefit* of the Bankrupt; and therefore he may *wave* this Benefit: Which here he has done. Conſequently, it is not all *within* the Act of Parliament.

As to the Caſe of *Turner* v. *Schomberg*, in 2 *Strange* 1233, there was *no good Conſideration* to found the Promiſe. The Defendant had there given his Note for 36 *l.* and was afterwards *diſcharged* on the Inſolvent Debtors Act: Afterwards, he promiſed to pay the Debt, at 2 Guineas *per* Month; Part whereof, he paid; and was arreſted for the Remainder. There, he was diſcharged indeed on Common Bail: And it was holden to be no new Conſideration, but the *old* Debt. And ſo it was.

Mr. *Norton* was ſtopt by the Court, from proceeding to argue, on Behalf of the Defendant, in anſwer to what Mr. *Williams* had urged. For

The COURT held it quite unneceſſary to enter into the *general* and *principal* Queſtion, or to enter at all into the *Merits* of the Caſe, upon this preſent Motion: Since it would be very improper to determine ſuch a Point in this Method, upon a Queſtion about Special or Common Bail. Therefore they ſaid they would not meddle with the Merits, nor give any Opinion at all upon the *general* Queſtion. But

As to the *particular* Queſtion, which was the Subject of the preſent Motion, they were unanimous "that he ought "to be diſcharged upon *Common* Bail." For

Lord MANSFIELD obſerved, that the preſent Queſtion is no more than "Whether this Promiſe made by the De-"fendant under the Circumſtances ſtated, and founded only "upon a *conſcientious* Obligation, ſhall intitle the Plaintiff "to keep him *in Priſon*." This would be taking Advantage of his *Conſcientiouſneſs*, to uſe it *againſt* Conſcience.

Mr. Juſt. FOSTER added, that the Caſe in 2 *Strange* 1233, determines, directly in Point, the Queſtion as to *Bail*. And

Mr.

* Mr. Juſt. WILMOT thought that Caſe to be even ſtronger than this. * P. 738.

Per Cur. unanimouſly,

RULE made abſolute, to diſcharge the Defendant upon COMMON Bail.

Rex *verſ.* Mayor, Aldermen and Burgeſſes of Doncaſter.

Saturday 3d *February* 1759.

A *Mandamus to reſtore Theoſebius James Buckley Wilsford* to the Office of One of the *Capital Burgeſſes* of the Corporation of *Doncaſter.*

The Mayor Aldermen and Burgeſſes return, that they were a Burrough by Preſcription, and were incorporated by Charter on the 2d of *May* 16 *C.* 2. with Power to make By-Laws *&c*, and to inforce them by Fines *&c:* Which Charter fixed *the Thurſday next after Bartholomew-Day*, yearly, for the Mayor Aldermen and Capital Burgeſſes to meet together, for the Election of a Mayor; who ſhould take his Oath of Office on the *Thurſday* next before *Michaelmas*; and made Proviſion for a new Election, in Caſe of Death or Amotion, and alſo for filling up the vacant Places of deceaſed or amoved Aldermen and Bnrgeſſes. Then it alledges the Acceptance of theſe Letters Patent. Then it ſhews that the ſaid *Theoſebius James Buckley Wilsford*, on the 6th of *September* 1737, was elected choſen ſworn and admitted a Capital Burgeſs. Then it alledges, that after the making and Acceptance of the Letters Patent, and before the iſſuing of this Writ of *Mandamus*, by Indenture made the 21ſt of *July* 1745, between the Mayor, Aldermen and Burgeſſes of *Doncaſter* of the one Part, and One *Thomas Smith* of the other Part, for the Conſiderations therein mentioned, the ſaid Mayor Aldermen and Burgeſſes *did* DEMISE AND TO FARM LET *to the ſaid* THOMAS SMITH divers Lands and Tenements of the ſaid Mayor Aldermen and Burgeſſes, ſituate and being, or being mentioned to be ſituate and being, at *Balby* in the ſaid County of *York*; To hold to the ſaid *Thomas Smith* his Executors Adminiſtrators and Aſſigns, from the 29th Day of *September* then laſt paſt before the Date thereof, for and during the full Term of ten Years from thenceforth next enſuing, at and under the Yearly Rent of 26 *l.* 10 *s.* payable half-yearly at *Lady-day* and *Michaelmas* by even and equal Portions.

Then they return, That the ſaid Mayor Aldermen and Burgeſſes, for a great Numbers of Years laſt paſt, have had and kept, and now have and keep a PUBLIC BOOK *for the Uſe of the ſaid Mayor Aldermen and Burgeſſes,* AS *a Corporation or Body Politic:* In which Book, the *Orders and Reſolutions* of the Mayor Aldermen

* P. 739. * Aldermen and Burgeſſes of the ſaid Burrough, for the Time being, AS *a Body Politic, relating to the ſaid Burrough, and the Orders and Reſolutions of the Common Council* of the ſaid Burrough for the Time being, and alſo the *Accounts of the Eſtates* of the ſaid Mayor Aldermen and Burgeſſes as a Body Politic, from Time to Time have been *written and entered, for the Uſe of the ſaid Body Corporate*; and *to which public Book, Each Capital Burgeſs* of the ſaid Burrough, as a Member of the Common Council of the ſaid Burrough, has, from Time to Time, at all reaſonable Times, *had Acceſs.*

They further certify and return, That after the Making and Acceptance of the ſaid Letters Patent, and before the Iſſuing of the *Mandamus*, to wit, on the 5th of *March* 1747, *at a Common Council* of and for the ſaid Burrough duly aſſembled and held in the ſaid Burrough, it was *Reſolved and Ordered by the ſaid Common Council* then and there ſo aſſembled, *amongſt other Things*, " That at the Expiration " of the then preſent Leaſe made by the ſaid Corporation " to the ſaid *Thomas Smith*, the Lands thereby demiſed " ſhould be let to *ſome other Perſon*:" And which Reſolution and Order was afterwards, to wit, on the 6th Day of *March* in the ſaid Year 1747, duly written and entered in the ſaid public Book of the ſaid Mayor Aldermen and Burgeſſes of the ſaid Burrough.

And they further certify and return, That after the making and Acceptance of the ſaid Letters Patent, and before the iſſuing of the Writ, to wit, on the 10th Day of *February* 1756, at the ſaid Burrough of *Doncaſter*, He the ſaid *Theoſebius James Buckley Wilsford*, then and there being One of the Capital Burgeſſes of the ſaid Burrough, and alſo a Member of the Common Council of the ſame Burrough, and then and there well knowing that the laſt mentioned Reſolution and Order was then written and entered in the ſaid Public Book; He the ſaid *Theoſebius James Buckley Wilsford did unlawfully knowingly* and *wilfully*, and CONTRARY to the *Duty of his ſaid Office* of one of the Capital Burgeſſes of the ſaid Burrough, and *without the* CONSENT of the then Mayor Aldermen and Burgeſſes of the ſaid Burrough, and alſo *without the* CONSENT of the then Common Council of the ſaid Burrough, DEFACE AND OBLITERATE *the* ENTRY of the laſt mentioned Reſolution and Order ſo written made and entered in the ſaid Public Book as aforeſaid; *To the* GREAT *Damage* of the Mayor Aldermen and Burgeſſes of the ſaid Burrough.

They further return, that afterwards, at an *Aſſembly* of the Mayor Aldermen and Burgeſſes of the ſaid Burrough, held in and for the ſaid Burrough of *Doncaſter* in the *Guildhall* of the ſame Burrough, on the *7th Day of March* in the Year of

* of our Lord 1775, they being ſo * DULY aſſembled for the good Rule and Government of the ſaid Burrough; and *George Waterer*, Eſq; the then Mayor of the ſame Burrough, and alſo the ſaid *Theoſebius James Buckley Wilsford*, then One of the Capital Burgeſſes of the ſaid Burrough, being then and there *preſent*; He the ſaid *Theoſebius James Buckley Wilsford* was then and there, *at and in the* SAME *Aſſembly, charged and accuſed* "That He had defaced and obliterated "the ſaid Entry of the laſt mentioned Reſolution and Order "ſo written made and entered in the ſaid Public Book as "aforeſaid:" and the ſaid *Charge and Accuſation* was thereupon *read to* the ſaid *T. J. B. W.* then and there, at and in the *ſame Aſſembly*; And he was *aſked*, by *Richard Sheppard*, Gent. then the Common Clerk of the Mayor Aldermen and Burgeſſes of the ſaid Burrough of *Doncaſter* then and there preſent, and then and there the proper Officer on that Behalf, and by the Command of the ſaid *George Waterer* then the Mayor of the ſame Burrough, "If he had or knew any thing to "ſay for himſelf, in his Defence againſt the Charge afore-"ſaid." And the ſaid *T. J. B. W.* thereupon, at and in the *ſame* Aſſembly then and there DID CONFESS AND ACKNOWLEDGE "That he *did deface and obliterate the* "*ſaid Entry* of the ſaid Reſolution and Order ſo written "made and entered in the ſaid Public Book as aforeſaid, "and with which he was then and there charged as aforeſaid." And he did *not then or there ſhew* any ſufficient Cauſe why he ſhould not *therefore be removed and diſplaced* from his ſaid Office of One of the Capital Burgeſſes of the ſaid Burrough of *Doncaſter*; Nor *did then or there require or deſire to have any further Day or Time* to be allowed him to make a Defence to the ſaid Charge, or to ſhew Cauſe why he ſhould not be removed and diſplaced from his Place and Office of One of the Capital Burgeſſes of the ſaid Burrough, for the ſaid Offence. Whereupon *the* SAID *aſſembly* of the Mayor Aldermen and Burgeſſes of the ſaid Burrough having taken the Caſe of the ſaid *T. J. B. W.* into Conſideration, and having fully and deliberately weighed the ſame, did then and there Order that the ſaid *T. J. B. W.* FOR *his* SAID *Offence* ſhould be REMOVED AND DISCHARGED from his ſaid Place and Office of one of the Capital Burgeſſes of the ſaid Burrough: And the ſaid *T. J. B. W. was then and there accordingly*, by the ſaid Mayor Aldermen and Burgeſſes of the ſame Burrough ſo *aſſembled as aforeſaid*, then and there *removed and diſcharged* from his ſaid Place and Office of One of the Capital Burgeſſes of the ſaid Burrough of *Doncaſter*.

* P. 740.
* *Vide ante* 731, 733, 734, 735.
Rex v. *Mayor &c. of Liverpool* (Clegg's Caſe)

They alſo further return, that the ſaid *T. J. B. W.* at any Time ſince his being ſo removed as aforeſaid, hath not been nominated elected ſworn admitted or reſtored to or into the Place and Office of One of the Capital Burgeſſes of the ſaid Burrough of *Doncaſter*.

And

* P. 741. * And for theſe Reaſons, They cannot reſtore or cauſe to be reſtored the ſaid *T. J. B. W.* into the aforeſaid Place and Office of One of the Capital Burgeſſes of the Burrough aforeſaid, with all the Liberties and Franchiſes to the ſaid Place and Office belonging and appertaining, as by the ſaid Writ they are commanded to do.

N. B. Mr. *Wilsford* had at firſt *traverſed* the ſeveral Facts alledged in the Return; and Seven Iſſues were joined thereupon: But he afterwards deſerted his Traverſes, and ſet the Return down in the *Paper*, to be argued upon its Validity in Law.

Qu. concerning the *Regularity* of this, if it had been objected to.

Mr. *Gould*, on Behalf of the Proſecutor, objected to this Return—

1ſt. That the ASSEMBLY which made this Amotion does *not* appear to have been *legally holden*; for want of its being ſtated that *particular Notice* was given previouſly, to the *Members* of the Corporation, "That this *particular* "*Buſineſs, of the Amotion* of this Capital Burgeſs, was "*intended* to be thereat proceeded upon."

2dly. That *no ſufficient Cauſe* of Amotion is *properly ſet out*: For the Sole Foundation of the Amotion is reſted upon his *Confeſſion* of a *Charge* which is *itſelf defective*: As the Charge itſelf, after giving a Narrative of the Fact, *only in general* alledges it to have been done "to the *great Damage* of "the Corporation," but does NOT SPECIFY *any* PARTICULAR Damage that they ſuffered in Conſequence of it.

3dly. That the Corporation had no Power to amove him for an *Offence ſuch* as THIS *is*, WITHOUT *a previous Conviction*, at Common Law.

But before he entered particularly into theſe Objections, He firſt *premiſed in general*, That Returns to *Mandamuſes* ought to be *certain*; And that every Thing ought to be intended *againſt* ſuch Return. To prove which He cited 6 *Mod.* 309. *Queen* v. *Mayor of Hereford*, 2 *Salk.* 432. *Rex* v. *Mayor of Abingdon*, (the 2d Point of it.) 1 *Shower* 364, *Glyde*'s Caſe; *Rex* v. *Mayor and Aldermen of Exeter*. And this Preciſion is *equally neceſſary* * *ſince* the 9 *Ann. c.* 20. *as before* that Act.

*V. ante. pa. 733, 734.

He then enlarged upon his 3 Objections.

Firſt—

* First—This Amotion was made by the *whole* Body Politic, *not* by a ſelect Part of it; on a * *By*-Day, *not* upon the Charter-Day; and upon a GENERAL *Summons* to meet to tranſact the Buſineſs of the Corporation, *not* upon a particular Notice to meet upon *this particular Affair.* * P. 742. *V. *ante*, pa. 731 to 736.

Every Corporation has an Intereſt in each of its Members: Which is proved by the Caſe of the Burrough of *Wigan. Tr.* 27 *G.* 2. *B. R.*

And a Reſignation of a Corporate Intereſt cannot be made to a ſelect Body. *Rex* v. *Powel B. R.* 5 or 6 Terms ago.

In the Caſe of *Kynaſton* v. *Mayor and Aldermen of Shrewſbury*, It was ſettled, "that upon an Amotion on a Day "which is *not* the General Charter-Day, *Every* Member "muſt be ſummoned."

Second Objection—The Leaſe mentioned in the Return was made by the *whole* Corporation. He obſerved alſo that the Expreſſion was "amongſt other Things:" And cited 2 *Salk.* 417. *Rex* v. *Bear.* This is *not an Offence ſufficient* to ground an Amotion from his Freehold upon; there being *no particular Damage* to the Corporation ſpecified or even alledged. 11 *Co.* 99. *James Bagg*'s Caſe. *Carthew* 176. *Sir Thomas Earle*'s Caſe.

Third Objection—Admitting (for Argument's Sake) the Cauſe of Amotion to be in its own Nature ſufficient, Yet, nevertheleſs there ought to have been a PREVIOUS *Conviction* at Common Law; As this Offence is both an Offence againſt the Duty of his Office as a Corporator, *and alſo* indictable at Common Law.

He cited *Rex* v. *Mayor of Derby*, *Tr.* 8, 9 *G.* 2. *B. R.* Where Ld. *Hardwicke* fully explained this Subject, and cited the Caſe of *Rex* v. *Mayor of Wilton*, (which Caſe is imperfectly reported in *Comberb.* 396. by the Name of *Rex* v. *Chalk*; and is the ſame Caſe with *Rex* v. *Mayor and Burgeſſes of Wilton* in 5 *Mod.* 257, and in 2 *Salk.* 428. *Pl.* 2.) where the Offence was ſtriking out One Name and putting in another; And his Lordſhip alſo cited *Parrot*'s Caſe, *Queen* v. *Mayor of Newcaſtle*, *M.* 8 *Ann. B. R.* and *M.* 8 *G.* 1. *B. R.* the Caſe of *Carliſle*, "for corrupting a Member of "the Corporation to give a Vote;" where the Court were equally divided: Which Caſes, Mr. *Gould* ſaid, were cited by Ld. *Hardwicke*, to ſhew the *uncertain* State wherein this Matter then ſtood; and which His Lordſhip and the Court left to be determined and ſettled, when a proper Caſe ſhould come directly in Judgment to require it.

Mr.

* P. 743. * Mr. *Gould* therefore urged that if the preſent Offence be of ſuch a Magnitude as to amount to a ſufficient Cauſe of Amotion, there ought to have been a *previous Conviction* at Common Law: becauſe it might otherwiſe happen, that he might afterwards (ſubſequently to his Amotion) be indicted *and* ACQUITTED, in which Caſe there would be *contrary Judgments* upon the ſame Fact.

And this Objection is not anſwered by comparing ſuch contrary Judgments to Caſes where the Temporal and Spiritual Courts are *Both* permitted to proceed upon the ſame Fact; becauſe *they* proceed *diverſo intuitu*. For in this Caſe, the *Corporation* would be obliged to look upon the Temporal Verdict as *Evidence*: Whereas the *Spiritual* Court do *not* receive a Verdict as *Evidence*, at leaſt not as *concluſive*.

Mr. *Luke Robinſon contra*, for the Return.

As to what Mr. *Gould* had in general premiſed, He obſerved that the *Reaſon* of requiring ſuch preciſe Certainty in a Return to a *Mandamus* is *at an End*, * ſince the Statute of 9 *Ann. c.* 20: Since which Act, the Law may be aſcertained by a Demurrer; or the Fact tried by Traverſes.

* *Sed V. ante* 733, 734.

The Reaſon given by the Ch. J. in 2 *Salk.* 432. is *now* a Reaſon *againſt* requiring ſuch Preciſion: And Mr. Juſt. *Eyres* goes too far in *Glyde*'s Caſe, in ſaying "That *every* "Thing ſhall be intended againſt a Return."

The three Objections are (1ſt.) To the Want of previous *Notice* of the *particular Buſineſs* to be tranſacted at the Corporate Aſſembly; (2dly.) To the *Cauſe* of Amotion; Which is urged to be inſufficient; (3dly.) To the Want of a previous *Conviction*.

† *V. ante* 731, 734.

Firſt—*No* ſuch *Special Notice* is at all neceſſary: And beſides, this Mr. *Wilsford* was † *preſent*, and *confeſſed* the Charge. And neither the Caſe of *Wigan*, nor that of *Shrewſbury*, are applicable to the preſent Caſe.

Secondly—The Offence charged *is* a *ſufficient Cauſe* of Amotion: And it is *not neceſſary* to ſpecify HOW, *in particular*, the Corporation has been damnified by it; it being alledged to be "to the Damage of the Corporation," which is enough. And neither *Bagg*'s Caſe, nor *Carthew* 176. will ſupport Mr. *Gould*'s Objection.

Thirdly—It would not have been eaſy to deſcribe this Offence ſo as to get the Party convicted of it at Common Law. However, a previous Conviction is not *neceſſary* in this Caſe;

* Caſe; which is that of a Miſdemeanour contrary to his Oath and to the Duty of his Office, but is *not* an *infamous* Offence. * P. 744.

As to the Caſes of *Derby*, of *Wilton*, and of *Newcaſtle*, they are no Authorities: For Mr. *Gould* admits the Point to have been uncertain, and to have been left ſo by Ld. *Hardwicke*. But

In 1 *Keb.* 597. *The Town of Wigan* v. *Pilkington*, an Alderman of that Burrough, The Amotion was holden good, on a *Mandamus*, *without* any previous Conviction; "for "that, contrary to his Oath, he *ſpoliavit et dilaceravit quæ-* "*dam Recorda* of ſuch a Court."

Mr. *Gould* in Reply—As to the general Poſitions premiſed by Him—

Mr. *Robinſon* allows that *Preciſion* was neceſſary in a Return to a *Mandamus*, *before* the 9 *Ann. c.* 20. But that Act does *not excuſe* the Neceſſity of ſuch Preciſion in the Return; though it gives a Traverſe to the material Facts alledged in it.

1ſt Objection. If Notice had been given of this intended Amotion, ſome Member or other who had thereupon attended, might perhaps have given ſuch Reaſons to the Aſſembly, as might have altered their Opinions. And this Argument holds equally ſtrong, in the Caſe of a Corporate Aſſembly of the *whole* Body, upon a Day which is not a Charter or Preſcription Day, as it does in the Caſe of a * *Select Body*. * *Vide ante* 731, 733, 734, 735

2d Objection. It ought to be ſuch an Offence as tends to the *Deſtruction*, or *Injury* at leaſt, of the Corporation. And *Bagg*'s Caſe, and *Carthew* 176. prove this. *Rex* v. *Mayor &c. of Liverpool.*

3dly. Ld. *Hardwicke* conſidered this Point of a previous Conviction as *unſettled*, *in Tr.* 8, 9 *G.* 2.

Lord MANSFIELD obſerved, that Corporation-Law ought to be *well* ſettled: And therefore He was willing to hear it argued again. ULTERIUS CONCILIUM.

This former Argument, jnſt now recited, was on *Saturday* the 25th of *November* laſt; And it now ſtood in the Paper for further Argument. But

Mr. *Yates*, who was to have argued for the Corporation, gave up the Return; The firſt Objection taken to it, being the ſame Point as was determined on *Wedneſday* laſt, in the Caſe of † *Rex* v. *Mayor Bailiffs and Common Council* †See the 1ſt Point of that Caſe.

* P. 745. *Council of Liverpool (Clegg's* Caſe) *ante pa.* 723 to 736.

Whereupon, the like Rule was taken, as was made in that Caſe; *viz.* That the RETURN be quaſhed, And that a Peremptory *Mandamus* do iſſue.

Rex *verſ.* Hartſhorn et al'.

MR. *Caldecot* moved, in *Trinity* Term laſt, *(Wedneſday* 31ſt of *May* 1758,) to quaſh an Order made *(originally)* at the *General* Quarter Seſſions, upon the Surveyors of the Highways of *Royſton* for the Years 1751, 2, 3, 4, 5, and 6, "to paſs their Accounts reſpectively, and pay over "the Money aſſeſſed and collected *&c*, to the preſent Over-"ſeer *&c*."

He took 2 Exceptions: *viz.*

1ſt. The *original Application* ought to have been to a *Special* Seſſions: for the *General* Quarter Seſſions have no Authority *originally*, but ONLY *upon Appeal*. To prove which, he alledged 3, 4 *W. & M. c.* 12. §. 9. 1 *Hawk. P. C.* 218. §. 80.

2d Exception—This Order "for Overſeers *ſo long out of* "*Office*, as 1751, 2, 3, *&c*, to pay over to the *preſent* "Overſeers," is not right: For, Each ought to pay over to his *immediate* Succeſſor.

A Rule having been afterwards obtained by the other Side, to ſhew Cauſe "Why the *Certiorari* ſhould not be quaſhed;"

Mr. *Caldecott*, on *Monday* 27th of *November* laſt, ſhewed Cauſe againſt the * *Certiorari* being quaſhed: Which Cauſe was "That the *Proſecutors had enlarged* the Rule for ſhew-"ing Cauſe why the *Order* ſhould not be quaſhed." Which

The COURT held to be a *ſufficient Cauſe*; And that it was *too late*, *after* having *themſelves enlarged that Rule*, to object to the *iſſuing* of the *Certiorari*.

Which being determined againſt the Proſecutors. The former Rule (to ſhew Cauſe why the *Order* ſhould not be quaſhed,) was enlarged to the preſent Term.

Now, Mr. *Lee*, who ſhewed Cauſe againſt quaſhing the *Order*, firſt cited ‡ *Rex* v. *Wakefield et al'*, *H.* 1758. 31 *G.*

V. §. 23. of 3, 4 *W. & M. c.* 12. "that No Order made *by Virtue* of that Act, ſhall be removed by *Certiorari*." Yet if the *Quarter* Seſſions make an *original* Order, a *Certiorari* will lie; *per Hawkins, lib.* 1. *c.* 76. §. 80.

‡ *V. ante* 485.

* 2 *B. R.* to ſhew that the *Certiorari* and Return would not ſtand in his Way: And then proceeded to anſwer the Objections that had been made to the Order. * P. 746.

He began with the firſt; namely, to the Juriſdiction of the General Quarter Seſſions, as there had been *no previous Application* to a Special Seſſions. His Anſwer to this Objection was, that this was by *Conſent*.

Mr. Juſt. FOSTER obſerved, that *Conſent* cannot GIVE *Juriſdiction* to a Court that has *none:* And here the Objection is, "that this Court of General Quarter Seſſions had "NO *Original* Juriſdiction."

Per. Cur.

ORDER of the Quarter Seſſions QUASHED.

Chauvet and Another *verſ.* Alfray.

MR. *Baynham*, on Behalf of the Defendant in Error, ſhewed Cauſe, why the *Fieri facias* ſhould not be ſet aſide, and the Goods levied be reſtored.

This was an Action of Debt upon a Bond, given to the Plaintiff and Another, being Creditors of One *Sutton*, by a third Perſon, as Security for a partial Payment of the Debt of the ſaid *Sutton*, (which was thereby liquidated and aſcertained,) to his ſeveral Creditors; *viz.* 15*s.* in the Pound by Inſtalments: Which Bond was to be forfeited, if *Sutton* ſhould make Default in the ſaid Payment. The Plaintiffs having obtained Judgment againſt the Defendant, He brought a Writ of Error, but gave no Bail upon it, Whereupon, the Plaintiffs took out Execution: Which the Plaintiff in Error complained of, as being irregular. So that the Queſtion was, Whether this Bond, given by a third Perſon, and made to third Perſons for Payment of a Sum certain, by Inſtalments, (the laſt whereof was ſtill future, be an Obligation conditioned for the *Payment of Money only*, within 3 *J.* 1. *c.* 8. (made to avoid unneceſſary Delays of Executions.)

Mr. *Norton* and Mr. *Field*, for the Plaintiff in Error, urged that a Counter-Bond, or a Collateral Security for the Debt of another Perſon, is *not* a Bond for *Payment of Money only*; not within the Meaning of the Act of 3 *J.* 1. *c.* 8. And they cited *Yelv.* 227. *Gilling* v. *Baker*. 2 *Bulſtr.* 53. S. C. *Carthew* 28. *Gerrard* v. *Danby*, 1 *Shower* 14 S. C. *Comberb.* 105 S. C. 2 *Strange* 1190. *Thrale* v. *Vaughan*. *Lucas* 281. *Hammond* v. *Webb*.

Lord

* P. 747. * Lord MANSFIELD—The Court will not contract the Conſtruction of that *beneficial Act*, beyond any Precedent. And this Bond is clearly for the *Payment of Money* ONLY; and liquidated as to the Sum too: All the Debts are liquidated. The Money is only to be paid by *another Perſon*.

Mr. Juſt. DENISON concurred—And the being payable *by Inſtalments* makes no Difference.

Mr. Juſt. FOSTER and Mr. Juſt. WILMOT declared their Concurrence in this Opinion.

Per Cur'—The Rule upon the Plaintiffs to ſhew Cauſe "Why the Writ of *Scire facias* ſhould not be ſet aſide "for Irregularity, and the Goods levied be reſtored," (which Rule had been obtained upon Mr. *Field*'s Motion,) was now DISCHARGED.

Monday 5th February 1759.

Williams *verſ.* Rougheedge, (A *Priſoner* in Execution.)

THE Queſtion was "Whether the Priſoner, in Execu- "tion under Proceſs out of this Court, was *within* "*Time* to lodge a Petition for his being brought up to the "Aſſizes for the County Palatine of *Lancaſter*."

The Caſe was this—A Priſoner in Execution under Proceſs iſſuing out of *this* Court had (for want of rightly underſtanding the proper Juriſdiction to which he ought to have applied) *totally omitted* to petition *this* Court *within due Time*, "that He might be brought up to the Aſſizes &c, in "order to his being diſcharged upon the Inſolvent Debtors "Acts:" Although he had preſented a Petition to another *(improper)* Juriſdiction, within Time; *viz.* to the Judges of Aſſize for the County Palatine.

The Doubt was "Whether he was now *precluded* from "making his Application to *this* Court; And Whether the "*explanatory* Acts of 3 *G.* 2. *c.* 27. and 8 *G.* 2. *c.* 24. and "14 *G.* 2. *c.* 34. and 21 *G.* 2. *c.* 33. are revived by 29 *G.* "2. *c.* 28:" Or "Whether the Act of 2 *G.* 2. *c.* 22. be "ALONE revived; and the *explanatory* Ones, of that very "Act, *remain expired*."

The COURT (having looked into All theſe ſeveral Acts of Parliament,) Declared that ALL *theſe* Acts explaining and amending that of 2 *G.* 2. are revived by 29 *G.* 2. *as well* as the Act

* Act of 2 *G.* 2. itſelf; And particularly, that that of 8 *G.* 2. *c.* 24. (upon which the preſent Queſtion depends,) is now in Force: Conſequently, that in order to give this Court Juriſdiction, the Priſoner muſt come and apply to *this* Court by Petition, BEFORE the End of the *next Term* after his being charged in Execution; Otherwiſe, this Court has *no Juriſdiction* veſted or attached in it; As was determined in a Caſe (remembered by Mr. Juſt. *Deniſon*) of * *Smallwood* v. *Grant*, *H.* 21 *G.* 2. *B. R.* which Caſe was diſtinguiſhable from that of Sir *William Pool* v. *Lane*, in *Tr.* 16. *G.* 2. *B. R*; Where the Petition was *lodged in due Time*, and all was regular, except that 28 Days Notice only had been given inſtead of 30 Days. There indeed the Defendant was ſuffered to give a new Notice: But the Reaſon was, becauſe the Juriſdiction was in *that* Caſe *attached*, by the Original Petitions having been lodged *within* due Time; Whereas, in the *preſent* Caſe the Court have *no Juriſdiction* at all.

* P. 748.

* I believe the proper Name of it, was *Good* v. *Clarke*.

As to the Revival of the *explanatory* Acts, as well as the principal One, which had been at different times explained and amended by theſe ſeveral temporary Acts—The COURT held that theſe, being all attendant upon it, were in Effect *revived along with it:* For that it would be abſurd (as Mr. Juſt. *Foſter* obſerved) to revive, *unamended*, an Act which *wanted ſo many Amendments* as this Act had received.

Mr. Juſt. FOSTER obſerved alſo the particular Courſe of theſe Explanations and Amendments; *viz.* that the Acts of 2 & 3 *G.* 2. are continued by 8 *G.* 2. Then the 14th continues the 8th with the Amendments. Then the 21ſt continues 2 *G.* 2. *only*, without expreſsly naming the explanatory Ones. And the 29th implicitly follows the Precedent of the 21ſt. Which Act of 29th will itſelf expire the next Seſſions: When, He hoped, he ſaid, that more Accuracy would be obſerved.

† *V. poſt*, *pa.* 799. *Tr.* 1759. 32, 33 *G.* 2. *B. R.* The Priſoner's Caſe.

Mr. Juſt. DENISON ſaid that notwithſtanding the Inaccuracy of the Penning, ALL the former Acts were *revived* by the 29 *G.* 2.

And this Matter was taken *equitably*, in Petitions offered to the Court after the Expiration of theſe Acts: For upon the Revival of them, the Court equitably held, "That the "Priſoners ſhould have *another* Term after the then firſt "Term, allowed them to lodge their Petitions."

Rex

* P. 749.

Rex *verſ.* Gwynne et al'.

Thurſday 8th February 1759.

LORD *Mansfield* being abſent in the Dutchy-Court,

The Three Other Judges (on a defended Motion) granted a * *Procedendo*, at the Inſtance of the Defendant, to the Quarter Seſſions of * *Brecon*, upon an Indictment for an Aſſault removed up hither; Becauſe the *Certiorari* had not iſſued till AFTER the Defendants had *confeſſed* the Aſſault below: Though the Conviction was not after a Trial, and though ſeveral of the Juſtices were ſworn to be near Relations of Mr. *Gwynne*, one of the Defendants; namely, his Father, two Brothers, and an Uncle.

*V. *Rex* v. *Inhabitants* of Claſe in *Com' Glamorgan, Tr.* 1769. *B. R.*

Friday 9th *February* 1759.

Rex *verſ.* Inhabitants of Weſtbury.

See the *Abridgment* of this CASE, in the TABLE: And it may be ſeen *at large*, in my Quarto Edition of SETTLEMENT-Caſes, Page 470. N°. 150.

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* P. 753.

* Cooke *verſ.* Peter Sayer.

ON the Maſter's Report (made two Days ago)—The Queſtion, "*What* COSTS ſhould be allowed; and "*to whom*;" upon the following Facts ſtated; (in Conſequence of a Motion for a *Direction* to the Maſter; how to tax them.)

In an Action upon the Caſe for a Criminal Converſation with the Plaintiff's Wife, The Defendant, by Leave (purſuant to the Statute for the Amendment of the Law, 4, 5 *Ann. c.* 16.) pleaded two Pleas; (1ſt.) Not guilty; (2dly.) Not guilty within 6 Years. On the former Plea of "Not "guilty," *Iſſue* was joined; To the latter Plea there was a *Demurrer* put in by the Plaintiff. It ſo happened, that the *Iſſue* on the Plea of "Not guilty" was tried *firſt*, and found for the *Plaintiff*, with 50 *l.* Damages; *Then* the Demurrer was *afterwards* argued, and over-ruled, and determined for the *Defendant:* And *Each* Party had *Judgment*; *viz.* the Plaintiff, on his Verdict; and the Defendant, on the Demurrer. The Plaintiff taxed his Coſts upon the *Poſtea:* Then the Defendant came to tax his Coſts on *his Judgment* upon the *Demurrer*.

N. B.

N. B. By 8, 9 *W.* 3. *c.* 11. (for the better preventing frivolous and vexatious Suits.) §. 2. *Defendants* ſhall have Coſts againſt Plaintiffs, on Judgments given *for them*, upon any Demurrer put in by either Side. And

By 4, 5 *Ann. c.* 16. (for the Amendment of the Law,) which * enables Defendants to plead ſeveral Matters, * *V.* § 4. It is provided, " (§. 5.) That if any ſuch Matter " (pleaded by a Defendant,) ſhall upon a Demurrer " joined, be judged *inſufficient*, Coſts ſhall be given " at the *Diſcretion* of the Court." But there is *no particular* Direction in *this* Act, in Caſe of its being * judged *ſufficient*; (Which was the preſent Caſe:) * P. 754. So that *this* ſtands, I ſuppoſe, upon the former Act of 8, 9 *W.* 3. *c.* 11.

Maſter *Clarke* ſaid He *never* had known an Inſtance of this kind.

Lord MANSFIELD—Perhaps the particular *Circumſtances* of this Caſe may be conſidered, ſo as to determine it upon *them*, without entering into the *General* Queſtion. But, however, leſt the *General Queſtion* ſhould be involved, more or leſs, in this particular One, I would take a little Time to conſider of it.

CUR' ADVIS.

Lord MANSFIELD now delivered the Reſolution of the Court.

The two Pleas pleaded by the Defendant have received different Determinations: One, is founded againſt the Defendant; the Other has been adjudged for him. So that the Plaintiff, *upon the whole*, has *no* Cauſe of Action.

I ſaid, at the Time when this Matter was before Us, " That the particular Circumſtances of *this* Caſe, might " appear to be ſuch, when conſidered, as might be a ſuffi- " cient Foundation for our determining the Matter *now* in " Diſpute, *upon* thoſe particular Circumſtances, without " entering into the General Queſtion." But the *General* Queſtion is a Point that might require a good deal of Conſideration.

Upon looking into the Circumſtances here, We are All of Opinion, " That, the *particular Circumſtances* of this " preſent Caſe *are* ſuch as may very well ſuffice for our deter- " mining it *upon* theſe Circumſtances alone, *without* going " into the *General* Queſtion."

Now, upon the preſent Circumſtances, it is clear, That the Defendant muſt certainly have the Coſts of the DEMURRER, which has been adjudged for him.

*P. 749.

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Maſter *Clarke* ſaid He *never* had known an Inſtance of this kind.

Lord MANSFIELD—Perhaps the particular *Circumſtances* of this Caſe may be conſidered, ſo as to determine it upon *them*, without entering into the *General* Queſtion. But, however, leſt the *General Queſtion* ſhould be involved, more or leſs, in this particular One, I would take a little Time to conſider of it.

CUR' ADVIS.

Lord MANSFIELD now delivered the Reſolution of the Court.

The two Pleas pleaded by the Defendant have received different Determinations: One, is founded againſt the Defendant; the Other has been adjudged for him. So that the Plaintiff, *upon the whole*, has *no* Cauſe of Action.

I ſaid, at the Time when this Matter was before Us, " That the particular Circumſtances of *this* Caſe, might " appear to be ſuch, when conſidered, as might be a ſuffi- " cient Foundation for our determining the Matter *now* in " Diſpute, *upon* thoſe particular Circumſtances, without " entering into the General Queſtion." But the *General* Queſtion is a Point that might require a good deal of Conſideration.

Upon looking into the Circumſtances here, We are All of Opinion, " That, the *particular Circumſtances* of this " preſent Caſe *are* ſuch as may very well ſuffice for our deter- " mining it *upon* theſe Circumſtances alone, *without* going " into the *General* Queſtion."

Now, upon the preſent Circumſtances, it is clear, That the Defendant muſt certainly have the Coſts of the DEMURRER, which has been adjudged for him.

But as to the Coſts of the TRIAL—We think that the Plaintiff ought *not* to have them, *though* he has obtained a Verdict upon *this* Iſſue: For *upon the* WHOLE, he had *no* Cauſe of Action. The Demurrer is deciſive, as to *that*. And he has acted unadviſedly, in carrying this Iſſue down to Trial, before the Determination of the Demurrer.

We cannot ſay "That the Defendant did *wrong*, in "pleading Not guilty, *as well as* Not guilty within Six "Years:" We cannot determine that he had no Pretence for ſo doing.

* P. 755. * It has been objected, "That this was *unneceſſary*, and "that it was *implied* in the Plea of Not guilty within Six "Years."

But it *may* be neceſſary: And it is *not implied* in the other Plea of "Not guilty within Six Years;" as that Plea *might* have been managed in the Courſe of Pleading. For the Plaintiff *might* have replied "That he ſued out an Original "Writ within the Six Years;" and put the Defendant to anſwer to that Allegation; and ſo carried it off *from the Merits*, to a *collateral* Point: In *which* Caſe it could never have come to be tried, upon this *ſecond* Iſſue, "Whether "he was or was not *guilty of the Fact*."

Conſequently, it is not true, "that upon this ſecond Iſſue, "the former was *neceſſarily* included and implied."

Therefore We cannot ſay that the Defendant was *ſo* in the wrong in pleading Not guilty, generally, that he ought to PAY *Coſts for ſo doing*. And yet, on the other hand, that Plea being found *falſe*, he ought not to RECEIVE Coſts of the Plaintiff, upon the Trial of that Iſſue which has been found *againſt* him.

But nevertheleſs, though it is found againſt the Defendant; yet the Plaintiff cannot have *Damages* upon it; becauſe *upon the* WHOLE, Judgment muſt be *againſt* him: And therefore, neither can he have *Coſts* upon it. So that the *Judgment* muſt be for the *Defendant*, clearly; And he alſo muſt have *Coſts of the* DEMURRER: But upon the *Trial*, there are to be NO *Coſts on* EITHER *Side*: But Each Party is to ſit down by his own Coſts.

N. B. There was no Rule drawn up in Form; this Declaration of the Court being only by way of *Direction to the Maſter*, in what Manner to tax theſe Coſts.

Alder

Alder *verſ.* Chip.

Saturday 10th February 1759.

MR. *Huſſey* ſhewed Cauſe againſt a Rule of Mr. *Gould*'s, "Why the Plaintiff ſhould not be at Liberty to "*withdraw his Replication*, and *reply de novo*.

The Caſe was, that the Plaintiff had (by the Miſtake of his former Attorney) traverſed a Leaſe under which He himſelf claimed.

The COURT made the Rule abſolute.

* Lord MANSFIELD ſaid He conſidered this as an *Amendment*; and that the propoſing it in this Method, of withdrawing the Replication and replying *de novo*, was only to prevent the defacing and obliterating the Roll. He obſerved, that the Court had not uſed the ſame *Strictneſs* of late Years, with regard to *Amendments*, as they formerly did: And he ſaid, it was much better for the Parties that they ſhould not. However, the Court would always take Care that if One Party obtained Leave to amend, the *other* Party ſhould not be *prejudiced nor delayed* thereby. * P. 756.

And He obſerved that the Caſe of the * Bank of *England* v. *Morrice* turned upon its own particular Circumſtances, and was the Caſe of an *Executrix* too. *V. 2 Strange 1002.

Note—The Length of Time in the preſent Caſe, had been objected; *viz.* 6 Terms. But it was anſwered, "that in many Caſes, Amendments had been made "after a *much longer* Time."

RULE made ABSOLUTE.

V. Poſt. Hutchinſon, Executrix, *v.*
Brice. 24th *January* 1771.

George, *ex dimiſſ.* Bradley *et al'*, *verſ.* Wiſdom.

Monday 12th February 1759.

MR. *Norton* ſhewed Cauſe againſt, And

The COURT, (conſiſting, at preſent, of Ld. *Mansfield* and Mr. Juſt. *Deniſon*,) diſcharged a Rule which had been made on Mr. Serj. *Nares*'s Motion, "to ſhew Cauſe "Why a Writ of *Habere facias Poſſeſſionem*, ſhould not "be ſet aſide, as being *irregularly iſſued and executed*, "with Coſts; And why *Poſſeſſion* of the Premiſſes in "Queſtion ſhould not be *reſtored* to the Defendant.

This was an *Ejectment*, in which, *Wiſdom* (the *Landlord*) had (upon the Tenant's refuſing to appear) made himſelf Defendant, in the Place of the Caſual Ejector; (againſt whom Judgment was ſigned, for want of Appearance.) And the Plaintiff, having obtained Judgment againſt *Wiſdom* the Landlord, had afterwards moved for LEAVE *to take out Execution* againſt the Caſual Ejector: From doing which *without* Leave, He ſtood reſtrained by the *Conditional Rule* "for a Stay of Execution againſt the Caſual Ejector *till* "*further Order*," always made in Conſequence of a Clauſe in the Act of 11 *G.* 2. *c.* 19. which * Clauſe gives Leave for making the Landlord Defendant in the Room of the Non appearing Caſual Ejector, *upon* THESE *Terms.*

* § 13th.

* P. 757.

* But a *Writ of Error* had in Fact been regularly ſued out by the new Defendant *Wilſon* the Landlord, *before* the Plaintiff had made this Motion "for Leave to take out "Execution againſt the Caſul Ejector." Yet Nothing of this Matter of the Writ of Error was ſhewn for Cauſe, by the new Defendant *Wiſdom* the Landlord, againſt the Plaintiff's ſaid Motion "for Leave to take out Execution "againſt the Caſual Ejector:" But that Rule was made abſolute, *without any Cauſe* whatever being ſhewn againſt it.

The COURT, upon the whole State of this Affair, were of Opinion, That the *Day of ſhewing Cauſe* againſt *that* Rule was the *proper* Time for the Landlord to have made his *Stand* againſt the Plaintiff's taking out Execution and getting into *Poſſeſſion*; And that he ſhould have *then* ſhewn his Writ of Error *as Cauſe* why the Plaintiff ought *not* to have had Leave to take out Execution; and why it ought ſtill to have been further ſtayed: But that, as he had OMITTED to do ſo, when he had this * *proper Opportunity*, the Execution was *regular*, and conſequently ought not now to be ſet aſide.

*In the Caſe of *Jones, ex dimiſſ. Edwards* v. *Edwards*, *M.* 1745. *B. R.* It *was* ſo ſhewn for Cauſe, and allowed to be a good One.

RULE DISCHARGED.

Note—It was agreed on all Hands, that a Writ of Error could *not* have been taken out in the *Name* of the *Caſual* Ejector.

Rex *verſ.* Roger Philipps.

ON a Motion made on the Part of the Proſecutor, for my reviewing a *Taxation of Coſts*. The Caſe was, that the Defendant had had leave to *amend his Plea*, † on Payment of Coſts: But the Amendments made in it were not eſſential to the real Merits, nor ſuch as DEFACED *the Record* (there being much more *ſtruck out* than put in) *The Allowance* made to the Proſecutor upon the Amendments of

† *V. ante* 306.

of the PLEA itſelf, and of the *ſubſequent Pleadings* dependant upon it, had been only made, in *Proportion* to the *actual* Amendments made therein; and not as for a quite new Plea: Which was agreed on all Hands, to be the right Method.

But the Diſpute originally before Me, and now brought before the Court, was "Whether the REPLICATION "and *its* Dependencies ought to be *fully and wholly allowed* "to the Proſecutor, as an ABSOLUTE *Replication* DE "NOVO; Or *only partially*, in Proportion to the *real* "and *neceſſary* Alterations which were fairly and unavoid-"ably occaſioned to Him, by the Defendant's Amendment "of his Plea:" Which *latter* Method I had purſued, in taxing theſe Coſts.

* Lord MANSFIELD—The Principle is certainly right, That where the Defendant has Leave to amend his Plea, the Proſecutor ought, in Juſtice, to have *Liberty* to reply *quite de novo*, IF he judges proper; And alſo, that in *all* Events, he ought to be allowed the Expence of attending and conſulting and feeing Counſel, in order to *adviſe* whether it be prudent or proper to reply *de novo* or not. * P. 758.

But where he does NOT judge proper to depart from his former Replication and reply *de novo*; but *only* makes ſuch Alterations in it, as *merely* purſue and are the natural and neceſſary Conſequences of the Alterations made in the Plea by the Defendant, and which Alterations in the Replication do NOT *deface the Record*, (which, He took Notice, was the preſent Caſe; Nothing more ought to be allowed, than *in* PROPORTION for ſuch *neceſſary* Alterations and Amendments in the Replication and its ſeveral Dependencies: For it muſt not be left in the Proſecutor's Power to load the Defendant *unneceſſarily*; either out of Spite or Vexation, or for any other Reaſon exceeding the bare Neceſſity of the Thing.

Mr. Juſt. *Deniſon* (the only other Judge in Court) was of the ſame Opinion.

Conſequently, As I had acted agreeably to this Reaſoning, The Proſecutor's Counſel took Nothing by their MOTION.

Cox *verſ.* Hart.

MR. Serj. *Nares*, on Behalf of the Defendant below, who had removed the Cauſe hither by a *Habeas Corpus cum Cauſa*, ſhewed Cauſe why a *Procedendo* ſhould not go to the Sheriff's Court in *London*.

Mr.

Mr. *Norton*, who was for the Plaintiff below, had moved for, and obtained, this Rule, " to ſhew Cauſe Why a " *Procedendo* ſhould not iſſue;" And had founded his Motion upon this Fact, " that the *Habeas Corpus cum Cauſa* " was *not delivered till after an* INTERLOCUTORY *Judg-* " *ment* had been ſigned in the Court below, and Notice " given of executing a Writ of Enquiry;" and therefore, as He alledged, came too late, And ought not to have been received or allowed. And in ſupport of his Objection, He urged and relied on the *Spirit* and *Intention* of 21 *Jac.* 1. *c.* 23. §. 1, 2: Which *Intention* He inſiſted to be clear and beyond Doubt, againſt the Reception and Allowance of the Writ; though he acknowledged that the preſent Caſe was *not* within the WORDS of that Act.

* P. 759. * The Serjeant's Anſwer to this Objection was, That the *Words* of the Act are, " That the *Habeas Corpus*, " *Certiorari &c*, ſhall *not be received or allowed*, but that " the Inferior Judge may *proceed*; Except the Writ be *de-* " *livered* to ſuch Inferior Judge, *&c.* BEFORE *Iſſue or De-* " *murrer* joined in the Cauſe: (So as it be not joined within " Six Weeks after the Arreſt or Appearance of the Defen- " dant.")

And he produced Affidavits from ſome of the Officers of the Sheriff's Court, (which were likewiſe confirmed by Maſter *Clarke*,) atteſting that * PRACTICE is, " to allow " the *Habeas Corpus*, provided it be delivered at ANY *Time* " BEFORE THE † JURY IS SWORN."

*This Practice muſt have taken its Riſe from the Act of 43 *Eliz. c.* 5. which fixes this Criterion; and ſo have been continued on, without attending to the Alteration made by 21 *Jac.* 1. *c.* 23. † But that is directly contrary to the expreſs Words of the Preamble; which ſpecifies " *Suits ready for* " *Trials*," as what ought *not* to be removed.

Lord MANSFIELD—The preſent Caſe is *not* within the *Words* of the Act: That is plain. And it appears that the PRACTICE has gone *much further* than the Words of the Act: For *that* has been, to allow it at any Time before the *Jury be ſworn*.

Therefore Let the RULE be DISCHARGED.

The End of *Hilary* Term 1759.

Eaſter

* Eaſter Term

* P. 760.

32 Geo. 2. B. R. 1759.

Rex *verſ.* Inhabitants of Shenſton.

Wedneſday 9th May 1759.

This Case is *abridged*, in the Table: And it may be ſeen *at large*, in the Quarto Edition of my Settlement-Cases, Page 474. N°. 151.

* Rex *verſ.* Barnard Schiever a Swede.

* P. 765.

Mr. *Stowe* moved for a *Habeas Corpus* to be directed to *Richard Rigby*, Keeper of the Town-Gaol of *Liverpool*, to bring up the Body of *Barnard Schiever*, a Subject of a *neutral Power*, taken *on Board of an Enemy's Ship*; but forced, as it was alledged, *into the Enemy's Service.*

The Subſtance of the Affidavit upon which he grounded his Motion, was, That this *Barnard Schiever* was *born* in the Dominions of the King of *Sweden*; and his Father was now in that King's Service. That this *Barnard Schiever*, being bred to the Sea, and underſtanding Navigation, was *deſirous of entering into the Service of the Merchants of England*; and for *that Purpoſe* and for *no other Deſign* or Intent whatſoever, ſhipped himſelf as a Paſſenger from *Gottenberg* to *Elſineur*, in order there to enter on Board ſome *Engliſh* Merchant's Ship. That when he arrived at *Elſineur*, he applied to the *Engliſh* Conſul there, who ſhipped him, *as a Mariner*, on Board an *Engliſh* Merchant's Veſſel bound on a Voyage from *Hull* to *Dublin*: with which Ship he ſet ſail. That in proſecuting the ſaid Voyage, in the ſaid Ship, He was *taken by a French Privateer*, and carried into *Norway*; Where there was another Privateer. That he, together with

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with all the Priſoners taken on Board the *Engliſh* Veſſel, were put on Board the latter Privateer, called the *Mareſchal de Belliſle*, Captain *Thurot* Commander. That the Day after he was removed into the *Belliſle*, the *Engliſh* Priſoners were, by the Command of Captain *Thurot*, ſet aſhore at their Liberty: But all the Perſons belonging to the ſaid *Engliſh* Veſſel, who were Subjects of *Neutral* Powers, were *detained* to *ſerve on Board* the ſaid Privateer, (the *Belliſle*.) Upon which, this *Schiever* applied to Captain *Thurot* to ſet *him* aſhore likewiſe; Alledging, "He was *intitled* to his Liberty as being "a *neutral* Perſon." But *Thurot* told him "That for *that* "Reaſon He ſhould not go on Shore: For that he might as "well *ſerve him*, as ſerve the *Engliſh*; and that He would "*make* him *ſerve Him*;" or Words to that Effect. And accordingly *Thurot detained him* AGAINST HIS WILL *and Inclination, on Board of* the ſaid *Mareſchal de Belliſle Privateer*, and treated him with ſo much Severity, that he would not ſuffer him to go on Shore when in Port, upon his neceſſary Occaſions; but cloſely confined him to Duty, on Board the ſaid Privateer. That the ſaid Privateer commanded by *Thurot*, being on a Cruiſe, took two little Briggs: On Board of One of which, this *Schiever*, with ſome Others, were put, with Orders from *Thurot*, "to navigate the ſaid Brigg into "any Harbour in *Norway*." That the ſaid laſt mentioned Brigg was, in going to *Norway*, re-taken by the *Fame* Letter-of-Mark Ship, and carried into *Liverpool*: Where this *Barnard Schiever* was ſent to the Town-Gaol of *Liverpool*, as a *Priſoner of War*, under the Cuſtody of the ſaid *Richard Rigby* Keeper of the ſaid Gaol; and is now, and ever ſince has been detained there for no other Cauſe than the Cauſe aforeſaid. *Schiever* ſwears that his *Intention ſtill is* (could he obtain his Liberty) to enter as a Mariner into the *Engliſh Merchants Service*: and that he *would not* nor ſhould have *ſerved on Board the ſaid Privateer*, had he not been FORCED *thereto* and *detained* as aforeſaid by the ſaid Captain *Thurot*.

* P. 766.

One *Oluf Grundell*, who was on Board the *Belliſle* Privateer when *Schiever* was put on Board of it, ſwears that *Schiever* was FORCED *againſt his Inclination*, by the ſaid Captain *Thurot*, to ſerve on Board of it, in the Manner as *Schiever* has above depoſed; And that All the Perſons taken in the ſaid Veſſel, belonging to *Neutral* Powers, were forced by *Thurot*, in the like manner, to ſerve on Board the ſaid Privateer.

Mr. *Stowe* urged that it would be very hard upon this Man, to be kept in Priſon here till exchanged by Cartel; and then ſent back to *France*, where he would be forced into their Service again.

But

But the COURT thought this Man, upon his own ſhewing, clearly a Priſoner of War, and lawfully detained as ſuch. Therefore they DENIED the MOTION.

Rex *verſ.* Pigram.

Tueſday 15th May 1759.

ON ſhewing Cauſe againſt a Rule, ordering the Defendant, Mayor of the ancient Town of *Rye*, to ſhew Cauſe "Why he does not replace and put all the *Records and* "*Books* of the ſaid Town, in the *proper and uſual Place* of "keeping the ſaid Books and Records;"

The COURT, without entering into the *General Queſtion* "How far an Officer who has the Cuſtody of pub-"lick Corporation-Books, has Power to take them from "their proper and uſual Place, for certain particular Times "* and Uſes, or upon particular Occaſions or Accidents; * P. 767. "or how far He might be compellable in this ſummary "Way, to replace them;" were clear and unanimous, that in the *particular Inſtance* now before them, as it ſtood circumſtanced by reaſon of Diſputes which had in this Caſe ariſen between the Mayor and the Town-Clerk, The Mayor had given a *ſatisfactory Excuſe* for a *temporary* Securing them from falling into his Adverſary's Hands, who had already made an improper Uſe of One of them: And therefore they held it improper for them, in *this Caſe ſo circumſtanced*, to interfere in this ſummary Way, to oblige him to replace them. In Conſequence of which Opinion, They ordered the preſent Rule to be

DISCHARGED.

Strong, ex dimiſſ. Cummin, *verſ.* Cummin and Another.

Friday 18th May 1759.

Hil. 30. G. 2. Rot'lo 374.

THIS was a Special Caſe reſerved for the Opinion of this Court, at *Wincheſter* Aſſizes.

It was an Ejectment brought by *William Cummin*, againſt his Eldeſt Brother *Robert*, for Lands called *Smart* and *Picked Lands*; being Copyhold Lands, of which the Deviſor was, (amongſt divers other Copyhold Lands,) ſeiſed in Fee. He deviſed the chief Part of all his Copyhold Lands to his ſaid Eldeſt Son *Robert* and his Heirs, after the Deceaſe of his (the Teſtator's) Wife; and *theſe*, to his ſecond Son *John*, and eventually to the Plaintiff.

The

The Words of the Will are as follow—Whereas by the Power and Authority in me inveſted according to the Cuſtom of the Manor of *Eaſt Woodhay* aforeſaid, by ſeveral Surrenders by me made of my Copyhold Land in the ſaid Manor, I can diſpoſe of them to the Uſe of my laſt Will; I do hereby give and bequeath Singular my Copyhold Land and Tenements in *Eaſt Woodhay* aforeſaid hould by *ſeven* Copies of Court Roll, be the ſame more or leſs, to *my Eldeſt Son Robert and his Heirs, according to the Cuſtom, after his Mother Deceaſe*. *Item*, I give to my Son *John*, All that belong to *Smart and Picked* Lands, and *to his Heirs, after his Mother's Deceaſe*; and alſo that my Son *Robert* ſhall pay to my Eldeſt Daughter *Mary*, the Sum of *One hundred* Pounds of lawful Money, when She ſhall attain the Age of 21 Years; As alſo the like Sum of 100 *l.* to my Daughter *Eſter*, as ſoon as She ſhall attain the Age of 21 Years; and the like Sum of 100 *l.* to my Daughter *Ann*, when ſhe ſhall attain the Age of 21 Years; And alſo to my Son *Willem*, the Sum of *One hundred* Pounds, to be payd unto Hem when he ſhall attain
* P. 768. * the Age of twenty one Years: Provided alway that if my ſaid Daughter *Mary* or any of my other Children dye before he ſhe or they are one and twenty Years old, that in that Caſe he ſhall divide amongſt the Surviving Younger Children the Sum of One hundred Pounds. And IN CASE THAT YOUR SON *Robert or John dy, then your Son Willem is to have all that belong to Smart and Picked Lands, and to his Heirs:* and in Caſe that your Son *Willem* ingoye *Smart* and *Picked* Land, then to pay to his Siſter, the Sum of one hundred Pounds. Item, as to my worldly Goods, I give and Stock, I give to the Uſe of my Wife during her natural Life, and Liberty to diſpoſe of them at her Death as She ſhall think fit; provided it be amongſt my Children and their Iſſus. And his Wife to have the Freehold during her Life. Item, I do hereby make and appoint my dear Wife *Mary*, and my Son *Robert*, to be Exeators of this my laſt Will and Teſtament.

The Teſtator afterwards died ſeiſed in Fee *&c.* At the Time of his Death, the Perſonal Eſtate amounted to 200 *l.* and no more: And at that Time, All his Children were *under Age*; *viz. Robert*, the Eldeſt Son, Fifteen Years old; *John*, the Second Son, Three; *William*, the third Son, (the Leſſor of the Plaintiff,) One Year old; And all the Daughters, under Twenty-one.

The Widow was admitted, as Deviſee under the Will: And it is ſtated to be the Cuſtom, " for the Widow to enjoy " during Widowhood." *John* died in the Life-time of his Mother, *viz.* on the 21 of *April* 1756, *without* Iſſue, and inteſtate; being then UPWARDS *of* 21 Years of Age.

The

The Widow died very ſoon after her Son *John*, *viz.* on the 25th of *April* 1756, without having ever married again.

Mr. Serj. *Davy* for the Plaintiff (*viz.* *William* the third Son.)

The General Queſtion is, Whether upon the Event of *John* the ſecond Son's dying without Iſſue, in the Life-time of his Mother, the Teſtator's third Son *William* became intitled to the Premiſſes in Queſtion, by Force of theſe Words in the Will, " In Caſe that your Son *Robert* or *John dy*, " Then your Son *Willem* is to have all that belong to " Smart and Picked Lands:" Or whether the Eldeſt Son *Robert* is, upon *John*'s Death, to take the ſame, as Heir at Law to the Teſtator.

He inſiſted on the *Teſtator's Meaning* " That his Son " *William* ſhould have this Eſtate upon *ſome* Event or other." But this could not be, in Caſe of *John's leaving* Iſſue. Therefore it was in Caſe *John* ſhould die *without* Iſſue.

* The Eſtate was firſt given to " *John* and his *Heirs*, " after his Mother's Death:" Which the Teſtator meant for an Eſtate *Tail*; intending " Heirs of his *Body*." * P. 769.

N. B. There had been an Offer from the Defendant, to *divide* theſe Premiſſes in queſtion with his Brother; Which offer the Plaintiff *rejected*. But

Lord *Mansfield* having inquired " *What* this Offer had " been, and how it was received;" and ſeeming to think that it had been much more prudent to have accepted it;

Serj. *Davy* ſaid He had already, but in vain, adviſed his Client to accept it; and very ſtrongly hinted how ſmall Hopes he himſelf had of his Client's Succeſs, upon a *legal* Determination. After which, He proceeded to make the beſt of his Caſe that he could. And He ſaid that the *whole* Clauſe could not be rejected; however difficult it was to be underſtood.

Mr. *Gould*, *contra*, for the Defendant *Robert*, (the Heir at Law of the Teſtator, and alſo Heir at Law to his deceaſed Brother *John*.)

The *Intention* of the Teſtator is *totally* obſcure, dark and uncertain in the preſent Caſe. Therefore, the Heir ſhall have it. In 2 *Bulſtr.* 179, 180. *Mirrill* v. *Nichols*—It is laid down by Ld. *Coke*, " That *Intentio cæca* is not to be " taken; nec *Intentio mutila*, nec *manca*: In all *ſuch* Caſes,

" We

" We are to give Judgment for the *Heir*." Which Ld. *Coke* confirms by ſeveral Caſes which he there cites.

The Deviſe " to *John* and his Heirs" cannot be meant for an Eſtate *Tail*. For he deviſes to his Eldeſt Son *Robert*, in the ſame Words: Which plainly, in *that* Deviſe, mean the *abſolute Ownerſhip* to be given to *Robert*. Neither can it be an *Executory* Deviſe; There being no Mention of dying without Iſſue at all; nor any Reſtriction to the doing ſo *within the Life-time* of his Mother.

Mr. Serj. *Davy* in Reply, Chiefly urged that the Teſtator muſt have *meant* an Eſtate *Tail* to *John*.

Lord *Mansfield* thought it better, as it was a Family-Affair, to ſtand over, for the Chance of a Compromiſe.

It therefore ſtood over, by the Direction of the Court, till the *Friday* Seven-night.

* P. 770. * On which Day, The Cauſe ſtanding in the Paper; And the Leſſor of the Plaintiff, [*viz. William*, the third Brother,) abſolutely refuſing any Compromiſe with the Defendant (*Robert* his Eldeſt Brother;)

Lord MANSFIELD delivered the Reſolution of the Court, having firſt very minutely ſtated the Caſe.

It is very plain, from the Spelling and Phraſeology of this Will, That it is a rough Draught, of the Teſtator's *own* making or dictating, without Aſſiſtance from any Perſon capable of adviſing him.

It appears that he was ſeiſed, and died ſeiſed in Fee, of theſe Copyhold Lands; And it appears that the whole Amount of his *perſonal* Eſtate was at the Time of his Death 200 *l.* and *no more*: So that the Legacies given by his Will muſt be *Charges upon his* REAL Eſtate. And it likewiſe apppears, that *All* his Children were *under* Age at the Time of his Death.

I thought that No *Argument* could make this Caſe plainer than it was upon the *Will itſelf*. But I readily liſtened to a Compromiſe; that the Elder Brother might have an Opportunity (as he ſeemed diſpoſed to do ſo) of making ſome Proviſion for his younger Brother, in Conformity to his Father's Intention, out of that full Proviſion which He himſelf now had. The Elder Brother offered him Half of the Premiſſes now in Queſtion. The Younger refuſed it. The Elder ſtill adheres to his former Propoſal: And the Younger,

Younger, to his Rejection of it. Therefore We muſt now determine the Caſe according to *Law*.

The Rule of Conſtruction of Wills is, "That *no Tech-* "*nical Form* is neceſſary, to convey the Teſtator's Meaning."

The Words and Form of the Will are plainly the Teſtator's own, without any proper Advice or Aſſiſtance.

The Teſtator's *Meaning* muſt be *collected from the Will itſelf*; by attending to the ſeveral Parts of it, and comparing and conſidering them together.

In the Caſe of * *Coriton* v. *Hellier*, where there was a Slip in penning the Will, Lord *Hardwicke* did not conduct Himſelf by making an *arbitrary* Conſtruction of it; but was induced by a ſtrong and violent Preſumption ariſing from the ſeveral Parts of it compared and taken together with the Whole, to determine "That the firſt Limitation "to the Anceſtor meant to be for 99 Years, if he ſhould "ſo long live." * *V. poſt. pa.* 1631. S. C. cited.

* In the preſent Caſe, it is not difficult to diſcover what the Teſtator *intended*. He certainly did *not* mean *mere* Eſtates for *Lives*, to his two Eldeſt Sons; And if he did not mean to give them mere Eſtates for their Lives, it neceſſarily follows, "That He muſt mean a Dying upon SOME "*Contingency?*" The only Queſtion is, "WHAT *Con-* "*tingency?*" For he has *not expreſſed it*. He only expreſſes himſelf, "That in Caſe *Robert* or *John* DY, *then* "*Willem* is to have all that belong to Smart and Picked "Lands, and to his Heirs." *One* Part of the Contingency plainly is "That if they die *without Iſſue*." * P. 771.

He provides for his Eldeſt Son, by his beſt Copyhold Eſtate; for his ſecond Son, by his next beſt Copyhold Eſtate; and for the Reſt of his Children, by pecuniary Portions: *All* which Children were *under Age*. Now *if Robert had died under Age*, He could not have diſpoſed of his Eſtate: but it muſt have gone to *John*, if *Robert* had left no Iſſue. So alſo, *if John had died under Age*, his Share muſt have gone to *Robert*, if *John* had left no Iſſue. In *either* Caſe, that Son which remained the Eldeſt, would be very well provided for. Therefore the Teſtator meant that in *either* Event, *Smart and Picked Lands* ſhould go to *William* his third Son, who would *then* have become the *Second*.

But He could *not* mean that *John's* Proviſion ſhould *otherwiſe* go over to *William*. He could never mean it to do ſo, if *John* Himſelf left Iſſue, or if *Robert* left Iſſue: For he certainly never intended to provide for the Surviving Brother,

Brother, and leave the Iſſue of the deceaſed One quite *unprovided for*. Nor did He mean to tie down his two Eldeſt Sons, ſo as to preclude them from *diſpoſing* of their reſpective Eſtates, *after* they ſhould attain 21 Years of Age: It is clear that he meant their "Dying *under the Age of* "21 to be *another Part* of the Contingency." And the *Context* of the Will ſhews that this was his Meaning: For the other Proviſions (for the younger Children) expreſsly relate to their Living to 21, or dying under that Age. But this Contingency happens, *currente calamo*, to be *ſlipped*, in this Part of the Will. If *John* had died *before* 21, then *this* part of the Contingency would have taken Effect: But as that has *not* happened, his Brother *William* can have no pretence to claim.

Therefore We can only be ſorry that the Plaintiff has ſtood in his own Light in rejecting the fair Offer made to him by his Brother.

We are All clear for the Defendant: And therefore the *Poſtea* muſt be delivered to Him.

Rule for the *Poſtea* to be delivered to the Defendant.

*P. 772.

* Cornwallis *verſ.* Savery.

This was an Action of Debt upon a Bond, brought *for the Penalty*, (which was 1500*l.*)

The Defendant prayed Oyer of the Bond and Condition. Which Condition appears to be, That, Whereas One *William Wilkinſon* was appointed (by Earl *Cornwallis*) to be Agent to Colonel *Edward Cornwallis*'s Regiment; If the ſaid *William Wilkinſon* ſhould well and duly pay to the ſaid Colonel and to all the Commiſſioned and Non-Commiſſioned Officers and Soldiers of the Regiment, All ſuch Sum and Sums of Money as He ſhould receive from the Pay-Maſter-General for the Uſe of the Regiment; and faithfully account either to the Earl or to Colonel *Cornwallis &c*; and indemnify the Colonel *&c*; Then the Bond to be void *&c*: Otherwiſe *&c*.

Then the Defendant pleaded, That the ſaid *William Wilkinſon* continued Agent of the Regiment, from *&c* to *&c*; And that he did well and truly pay *&c*, (in the Words of the Condition;) And that he faithfully accounted *&c*, during all the Time that he continued Agent; And that the Colonel was not at all damnified.

The

The Replication aſſigned a Breach; *viz:* That during the Time that the ſaid *William Wilkinſon* continued Agent of the ſaid Regiment, He received from the Paymaſter-General, for the uſe of the ſaid Regiment, *ſeveral Sums of Money amounting in the Whole* to 1400*l.* for and on Account of the ſaid Regiment, and of the Commiſſioned and Non-Commiſſioned Officers and Soldiers of the ſame, according to their reſpective Proportions; All which He ought to have paid *&c:* But avers that the ſaid *William Wilkinſon* had not paid, and refuſed to pay a great Part thereof, to and amongſt the ſaid Colonel and the Commiſſioned and Non-Commiſſioned Officers and Soldiers of the ſaid Regiment, according to the ſeveral Proportions of their Pay.

To this Replication, the Defendant demurred; And ſhewed for Cauſe, "That it is uncertain, multifarious, "confuſed, perplexed, complicated, argumentative, dou-"ble," and many other ſuch Epithets.

Mr. *Caldecott*, for the Defendant, objected to the Replication—

1ſt. That the Plaintiff ought to have *confined* Himſelf to ONE *particular Breach*; as this is an Action of Debt upon the Bond, to recover the *Penalty*, and *not* an Action for *Damages*. For the Act of 8, 9 *W.* 3. *c.* 11. §. 8. does not extend to Actions of Debt brought for the *Penalty* of a Bond: It only relates to Actions for *Damages* for Non-performance of Covenants; and in *ſuch* Caſes, enables the Plaintiff to aſſign as many Breaches as he ſhall think fit. *P. 773.

In the Caſe of *Symms* v. *Smith*, *Cro. Car.* 176. The Diſtinction is laid down, "That in Covenant, the Plaintiff may "aſſign as many Breaches as he will; But *not* in Debt upon "an Obligation for Performance of Covenants."

Now here, it is charged that the Agent received *ſeveral Sums* of Money, amounting to 1400*l:* Great Part of which he has not paid to the Colonel Officers and Soldiers *&c*, according to the ſeveral Proportions of their Pay.

In the Caſe of the *Royal African Company* v. *Maſon* (which is cited in 1 *Strange* 227.) *P.* 13 *Ann. B. R.* The Action was of Debt on a Bond. The Condition was "That *Maſon* (who was recited to be Agent for the Company at *Briſtol*) "ſhould when required, pay to the Uſe of the Company, "All the Sums of Money in his Hands and Poſſeſſion, re-"ceived by him for the Company, to whom he was Agent "at *Briſtol*," The "Defendant pleaded Performance of "the Condition, generally; *viz.* That he had paid to the "Company

" Company all that he had received for them." The Plaintiff, in his Replication, aſſigned for Breach, " That *Ma-* " *ſon* did receive *of Jacob Reynolds and divers others*, for " the Uſe of the Company, *ſeveral Sums* of Money amount- " ing to 630*l.* Which he was requeſted to pay, but had not " paid." This Replication was holden ill; becauſe *many Breaches* were aſſigned; Whereas the Plaintiff ought to have aſſigned *only One:* And the Plaintiff diſcontinued. (He cited this from a Manuſcript Note of Ld. Ch. J. *Reeves*.) *

* See it alſo in *Lucas* 227.

2d Objection to the Replication. It ſays that the Money was to be paid " to the Colonel and all the Commiſſioned " and Non-Commiſſioned Officers and Soldiers of the Regi- " ment, according to the ſeveral Proportions of their Pay." Which is *uncertain* and *complicated*; and *no Iſſue* can be taken upon it.

3d Objection to the Replication—It concludes with an *Averment:* Whereas it ought to have concluded to the *Country*; there being an Affirmative and a Negative. For the Defendant pleads " That *Wilkinſon*, the Agent, *did pay* " *all that he had received* of the Paymaſter-General *&c.*" Then the Replication alledges " That he had received 140*cl.* " of him, and had *not* paid it." Which is an Affirmative and a Negative: And therefore the Replication ought to have concluded to the *Country*.

* P. 774. * Mr. Serj. *Nares*, for the Plaintiff, was prevented from anſwering theſe Objections: becauſe the Court did not think that they required any Anſwer.

Lord MANSFIELD—Mr. *Caldecott's Principles* are right; And the caſe cited by him may be ſo too: But his *Application* of them is wrong.

It is true, that where there are Alternative Parts of the Condition, the Plaintiff in an Action *upon the Bond*, FOR THE PENALTY, muſt confine himſelf to a *particular* Breach. But here *is only One* Breach aſſigned in this Caſe.

The Colonel is anſwerable for his Agent, whom he has appointed: And the Breach here aſſigned, is ſingly this, " That the Agent received 1400*l.* from the Paymaſter-Ge- " neral, which he has not paid to the Colonel, Officers *&c.*"

If he has omitted to pay *any Part* of it, it is a Breach of the Condition.

The

The Caſes cited from Ld. Ch. J. *Reeves*'s Notes is not like the preſent Caſe. That was Money received from *ſeveral different* Perſons: Here, it was *from One ſingle* Perſon only. And the Defendant has incurred a Breach of the Condition, if the Agent has received a certain Sum of Money from the Paymaſter-General for the Uſe of the Regiment, and has omitted to pay *any Part* of it to the Colonel and Officers, *&c.*

And as to the 2d Objection—The Pay of a Regiment is a Thing very well known and notorious. The Agent muſt be perfectly well acquainted with the reſpective Proportions belonging to the Colonel, Officers *&c:* And there was no Need to ſpin out the Proceedings to a great Prolixity, by ntering into the Detail and ſtating the various Deductions out of the whole Pay, upon various Accounts and in different Proportions.

3dly. The Replication is rightly concluded with an Averment. For though the Plea avers generally "That *William Wilkinſon* did pay *All* that he had received of the "Paymaſter-General, "Yet the Replication narrows this to a *particular Sum*, which it ſpecifies in certain to be 1400*l.* So that although there be an Affirmative and a Negative, Yet they are *not* applied to the *ſame* Thing: and therefore not within the Rule.

Mr. Juſt. DENISON was of the ſame Opinion.

* In an Action of Debt on a Bond *for the Penalty*, it is true that the Plaintiff is to aſſign *only one ſingle* Breach: And the Breach here aſſigned *is a ſingle* Breach. The Plea is Performance of Covenants, generally; and that the Plaintiff was not damnified. The Replication ſhews that the Agent received from the Paymaſter-General ſeveral Sums *amounting to* ſo much; Which it avers, "He has not paid "over:" Which is a *ſingle* Breach. The Caſe cited was of ſeveral Receipts *from ſeveral Perſons.* * P. 775.

It was not neceſſary to ſet out all the ſeveral Days and Times and Circumſtances, and thereby render the Record prolix, to no Purpoſe.

The Replication is a good Replication; and not double, nor complicated, nor uncertain, nor multifarious, nor any of the numerous Epithets that are given to it in the Demurrer.

3dly. The Objection to its Concluſion is only *Form:* And it is *not ſhewn for Cauſe*, "That it does want a proper "Concluſion."

" Concluſion." However, if it did, it would not avail: For this Concluſion, with an Averment, in the *preſent* Caſe, is *not* wrong.

Mr. Juſt. FOSTER and Mr. Juſt. WILMOT concurred in the ſame Opinion.

Per Cur. unanimouſly,
JUDGMENT for the PLAINTIFF.

Ballard and Another, Chamberlains of Worceſter, *verſ.* Bennet:

The ſame *verſ.* Clement.

MR. *Norton*, on Behalf of the Defendants in both Cauſes, ſhewed Cauſe againſt the Iſſuing of a *Procedendo*, to the Court below.

On *Friday* the 2d of *June* laſt, Mr. Serj. *Nares* had moved for a PROCEDENDO, to the Mayor Aldermen and Citizens of the City of *Worceſter*, to proceed in theſe Actions; which were Actions of Debt brought there, in the Name of the Chamberlains, and had been removed hither by *Habeas Corpus cum Cauſa*; To which they had returned a *By-Law*, made by the Corporation, " *to reſtrain* " *the Sale of Fleſh Meat* to certain proper Places, and that " it ſhould not be ſold in the public Streets, under a Penalty:"
* P. 776. * For which Penalty, the reſpective Actions were brought, in the Court of Pleas holden for the ſaid City.

The Words of the By-Law are, " That all Sorts of " Fleſh-Meat ſold within the ſaid City on the Market " Days or Fair-Days, by Butchers and other Perſons " not being Inhabitants and keeping open Shops within " the ſaid City, ſhould be publicly expoſed to Sale in " ſuch new-erected *Shambles*, and *not elſewhere* within " the ſame City; And that no Perſon or Perſons " whatever ſhould erect put or place, or cauſe to be " erected put or placed, or aſſiſt in the erecting putting or " placing any Stall Standing Bench Table or other Thing, " in any of the Streets Lanes or Alleys within the ſaid " City or the Liberties thereof, for the Selling or expoſing " to Sale, by any foreign Butcher or other Stranger " reſorting to ſuch Markets or Fairs, any Sort of " Fleſh Meat whatſoever. And that every Perſon " offending in the Premiſſes ſhould for every ſuch " Offence forfeit and pay to the Chamberlains of the " ſaid City for the Time being, the Sum of Three " Pounds, to be *recovered by Action of Debt*, in the " Name of ſuch Chamberlains, in the Court of Pleas

" held

" held for the ſaid City, *and not elſewhere*, with full
" Coſts of Suit, and to be applied by them to the Uſe
" and Benefit of the Poor belonging to the ſeveral
" Alms-houſes erected within the ſaid City."

This By-Law the Serjeant alledged to be a good One; And cited in Proof of it, 1 *Siderf.* 284. *Player* v. *Jenkins*.

Mr. Juſt. *Wilmot*, at the Time of the original Motion, recollected that there was a * Caſe in the Year-Books, (the Prior of *Dunſtable*'s Caſe,) about a Man's being reſtrained from ſelling Meat in his own Houſe.

* 'Tis in 11 *H.* 6. *fo.* 19. *pl.* 13. and *fo.* 25. *pl.* 2.

And Mr. Juſtice *Deniſon* and Himſelf the (only Judges then in Court) made a Rule to ſhew Cauſe why there ſhould not go a *Procedendo*.

On 5th *May* 1759, Mr. *Norton* ſhewed Cauſe againſt the *Procedendo*; and objected to the Validity of the *By-Law*.

But a PRELIMINARY *Doubt* was made by the Court, (originally ſtarted by Mr. Juſt. *Deniſon*,) " Whether the " Court would ſuffer a *By-Law to be objected to* in this *ſum-* " *mary* Way, upon a *Motion* on the Return of a *Habeas* " *Corpus*; in any other Caſes EXCEPT thoſe from the " *City of* LONDON."

* They agreed that this Method had been always practiſed upon By-Laws returned into this Court, to Writs of *Habeas Corpus cum Cauſa*, directed to the Courts of the City of LONDON; But they did not recollect any Inſtances where the ſame Thing had been permitted, in the Caſe of *any* OTHER City or Corporation.

* P. 777.

Mr. Juſt. *Deniſon* ſaid that ſuch a *Diſtinction* between the City of *London*, and *all other* Cities and Corporations, might perhaps ariſe from particular Methods of Recovery being eſtabliſhed and allowed by the *Cuſtoms* of *London*, which cannot be purſued in this or any other Court: So that the ſhewing that to be the Cauſe, is a good Cauſe of Detainer. For upon * theſe Writs of *Habeas Corpus*, the Perſons to whom they are directed muſt ſhew a good Cauſe of Detainer: And if this Court cannot proceed, as the Cuſtoms of *London* authorize their Courts to proceed; It is a good Cauſe of Detainer. Therefore the Court will there enter into the Validity of the By-Law, to ſee whether that be the Caſe or not: And if the By-Law appears to be bad, the Party ſhall be diſcharged, as being detained without Cauſe.

* Theſe Writs iſſue on the *Civil* Side, out of the King's Bench Office They order the *Perſon* of the Defendant to be brought up; together with the Day and Cauſes of taking and detaining Him.

And *no Writ of Error* lies *hither* from the Courts of the City of * LONDON. But in *all other* Cities and Corporations, if a *Habeas Corpus cum Cauſa* iſſues, and a By-Law is returned as the Foundation of the Action below, the *Method is not*, for the Defendant to object to the By-Law *upon Motion*; But the Plaintiff is to begin *de novo*, and to † declare over again, here in this Court: And therefore the Queſtion is Whether He ought not to do ſo here.

* In *other* Corporations a Writ of Error does lie, returnable in this Court. †*V. 6 Mod.* 177.

The COURT agreed with Mr. Juſtice *Deniſon*, that it was incumbent upon the Counſel for the *Procedendo* to ſhew that in any *other* Corporation *beſides London*, the Court had ever entered into the Queſtion concerning the Validity of the By-Law, *upon* MOTION.

But the Counſel for the *Procedendo* obſerved, That the Action given by *this* By-Law is reſtrained to be brought in that Court, "*and* NOT *elſewhere*:" Conſequently, no Action can proceed in *this* Court, founded upon *this* NEGATIVE By-Law; Nor can the Plaintiff declare *here*, upon the preſent By-Law.

The only Caſes in the Books, upon any By-Law containing ſuch *Negative* Words, (And all of them in *London*;) they ſaid, were 1 *Lev.* 14. *Mayor and Commonalty of London* v. *Bernardiſton*. 2 *Siderf.** 178. S. C. *Chamberlain of London* v. *Barnardiſton*. 1 *Keble* 32. S. C. *Player* v. *Barnardiſton* * 6 *Mod.* 123. *Cuddon, Chamberlain of London* v. *Provoſt*; and 6 *Mod.* 177. *Fazakerley* v. *Baldo*: (Both, on the ſame By-Law as *Barnardiſton*'s Caſe.) They alſo cited a Caſe of the *Chamberlain of London* v. *Groſvenor* 14 *G.* 2. *C. B.* and a later One of *Harris* v. *Wakeman* 28 *G.* 2. *B. R.* a Writ of Error upon a Judgment given in an Action founded on a By-Law in this very City of *Worceſter*.

* P. 778.

*Mr. *Norton* ſaid that 1 *Lev.* 14. was erroneouſly reported: For the By-Law had been ſearched; And there were *no* ſuch negative Words in it.

Mr. Serj. *Nares*, Mr. *Morton* and Mr. *Aſton*, of Council for the *Procedendo*, deſired further Time to look into this *Preliminary* Queſtion: For which, they ſaid they were not prepared, as they were not at all apprized of an Objection of this Sort.

The COURT granted it. But They obſerved, that if theſe *Negative* Words ſhould be *allowed to prevail*, All the Cities and Corporations in *England*, and even All the little Burroughs who had Courts of Record, would put negative Words into their By-Laws, and *exclude* this Court.

The Rules were therefore, at that Time, enlarged.

Theſe

Theſe Cauſes being now mentioned again.

Mr. Serj. *Nares*, Mr. *Morton*, and Mr. *Aſton* acknowledged that they could *not find any Inſtance* where the Court had entered into the Validity of the By-Law returned, in a *ſummary* Way, upon *Motion*; Except in thoſe which had been returned to *London*.

But they argued, that there was *no reaſon* to diſtinguiſh between *London* and *other* great Cities; And that the Hands of the inferior Court ought not to be tied up, where *this* Court cannot do the Plaintiff the *ſame Juſtice* that the Inferior Court (by Virtue of their local Cuſtoms) can. They urged the great Inconvenience of obliging the Parties reſiding in Corporations in the Country, to ſue in *this* Court for Penalties of very ſmall Value and upon local By-Laws: And they ſaid it would be very hard, if the Plaintiffs ſhould be excluded from entering on the Queſtion here, *upon Motion*, when it was impoſſible for them to ſupport a *Declaration there*.

They cited 1 *Ro. Rep.* 232, *Sterling*'s Caſe, as being within the ſame Reaſon as this Negative By-Law: Which Caſe was upon a Charter, which had the excluſive Words "And not elſewhere;" And would have been a Ground for a *Procedendo*, if it had been returned.

And they alſo mentioned *Wade* and *Bemboe*'s Caſe, in 1 *Leon.* 2. *Pl.* 3. and *Cro. Eliz.* 894. *Grice* v. *Chambers*; and * 1 *Mod.* 96. Anonymous: Which two latter Caſes are upon *Cognovit Actionem, & petit quod inquiratur de debito*; under Cuſtoms prevailing in *Norwich* and in *Briſtol*. * P. 779.

Mr. *Norton*, *contra*—This is a *mere perſonal Action*: It is *not* an Action grounded upon a *Cuſtom*. And it is a Caſe where *this* Court *can* give the like Remedy and do the ſame Juſtice that the inferior Court may.

Lord MANSFIELD—This is an Action upon a By-Law, and comes removed hither from a Corporation in the Country, upon the Return of a *Habeas Corpus*: And the whole Queſtion, at preſent, is, "Whether the Court can enter "into the Conſideration of the *Validity* of the By-Law, "*upon the* RETURN."

There is a *ſettled Courſe and Form of Proceeding* in Caſes of this Nature; of which there are many thouſand Inſtances: And yet, though there be ſuch Numbers of Inſtances of this kind, there is *not a ſingle One*, where the Court has ever determined the Validity of the By-Law, upon the RETURN, excepting in *London*.

As

As to the Validity of this *particular* By-Law, If it be true, " that there *never was ſuch a One*," that is a ſtrong Argument againſt its being a good One. However the *Validity* of it is not to be diſputed *upon the* RETURN; but in the *ordinary Courſe* of Proceeding in the like Caſes, *viz.* by the Plaintiff's *declaring* here, and the Defendant's demurring to it, if he thinks proper. It never has been done, in this *ſummary* Way, upon the *Return:* nor ever attempted or thought of before: And therefore We ought not to do it now. The proper Courſe is ſettled; It muſt be by *declaring* here: And the Defendant may demur, if He has any Objection to the By-Law.

As to *Sterling*'s Caſe in 1 *Ro. Rep.* 232. It is not an Authority in *this* Caſe. *Charters of Exemption* are very different from By-Laws of Corporations.

Mr. Juſt. DENISON was of the ſame Opinion. He ſaid that this had never been done, but upon Returns from the City of *London:* And this was an Attempt to get the Opinion of the Court extrajudicially.

Mr. Juſt. FOSTER—Let the Plaintiff *declare here.*

Mr. Juſt. WILMOT ſaid He had ſearched very diligently; but could *not find* any Inſtance, *except in London*, where the Court had ever entered into a Queſtion about the Validity * of a By-Law, *upon the* RETURN: And therefore he was clear " that the Court were not authorized to do ſo."

* P. 780.

Per Cur. unanimouſly,
The RULE " to ſhew Cauſe why a *Procedendo* " ſhould not iſſue," was DISCHARGED.

And The like RULE was alſo made in the other Cauſe.

Rex *verſ.* Richard Waite.

THE COURT *rejected Articles of the Peace*, which One *Thomas Burrough*, of the *Devizes*, offered to ſwear againſt the Defendant who *reſided at the ſame Place.*

Their Reaſon, and their only One, (for the Charge was exceedingly ſtrong,) was Becauſe the Exhibitant had not applied or endeavoured to apply to any Juſtice of Peace in his

his *own Neighbourhood*; but had choſen to come hither, at ſuch a *Diſtance* from the Defendant's Reſidence: Which Method would put the Defendant to the unneceſſary Inconvenience of being brought up hither, inſtead of finding Security in the Country.

For which Reaſon, They directed the Exhibitant to go before ſome Juſtice of Peace in the *Neighbourhood*; and there exhibit his Articles, and pray the Security of the Peace: Which the Defendant might then find in the Country, without coming up to *London* for that Purpoſe.

Rex *verſ.* William Lewis, Capital Burgeſs and Alderman of *New Radnor*.

Monday 21ſt May 1759.

UPON ſhewing Cauſe againſt an Information in Nature of a *Quo Warranto*, to ſhew by what Authority the Defendant acted in the Characters above mentioned, it appeared to the Court, that the Charge was exceedingly groundleſs and frivolous, and could not but be known to the Proſecutor to be ſo.

Whereupon *Per Cur.*
The RULE was diſcharged, *with* COSTS.

* Foſter *verſ.* Snow.

* P. 781.

CAUSE was ſhewn on the Part of the Plaintiff, againſt *diſcharging an Order made by Mr. Juſt. Deniſon at his Chambers*; and againſt the Defendant's being at Liberty to *wave his Plea*, and plead the General Iſſue.

Wedneſday 23d May 1759.

Mr. Juſtice *Deniſon*'s Order (made in the *Vacation*) was "That the *Defendant ſhould* PLEAD SUCH PLEA AS HE "WOULD STAND BY." And it was objected to it, "That *ſuch* an Order ought not to have been made by a "*Judge at his* CHAMBERS."

The whole Caſe was this. It was an Action on a Policy of Inſurance. The Declaration was delivered in *Hilary* Term laſt (on the 8th of *February*.) The Venue was laid in the County Palatine of *Lancaſter*. The Defendant's Attorney applied to Lord *Mansfield*, and obtained an Order from his Lordſhip, "for *ten Days* Time to plead; the De-"fendant pleading an *iſſuable* Plea, and conſenting to take "ſhort Notice of Trial (if neceſſary) for the next Aſſizes."

The

The Defendant had filed a Bill in Chancery: To which, No Anſwer was put in. The Defendant's Attorney, being deſirous to ſee what Anſwer would be made to this Bill in Chancery before he pleaded, endeavoured to ſtave off the Common Law Trial till after the then approaching Aſſizes: In order to obtain which End, He pleaded a *Sham Plea*, "of a Judgment recovered in another Court." On his pleading this Sham Plea, the Plaintiff's Attorney immediately applied (it being then *Vacation*-time) to Mr. Juſtice *Deniſon*, who made the above Order. Then the Plaintiff's Attorney put in a Replication "of *Nul tiel Record*;" and made up and delivered the Paper-Books, with the Common Rule indorſed thereon, "to return them within Four Days; otherwiſe a Writ to iſſue." The Defendant's Attorney returned the Paper Books within the 4 Days: But at the ſame Time gave Notice that he would move the Court "That "the Judge's Order might be diſcharged; and that the Defendant might be at Liberty to wave his Plea." And he afterwards made Affidavit of all the above ſtated Facts; and alſo "That he verily believed, from what Evidence he was "at preſent poſſeſſed of, together with ſuch further Evidence as he expected to ariſe from the Plaintiff's Anſwer "to the Bill in Chancery, that the Defendant would be able "to make a *good Defence* at the Trial of this Common Law "Cauſe." And he offered to *bring all the Money* demanded, *into Court*.

* P. 782. * The Court All agreed in juſtifying the Order made by Mr. Juſt. *Deniſon*, not only as being rightly made upon the Circumſtances appearing to Him; but alſo, as being ſuch a One as might be properly made by a Judge at his *Chambers*.

Lord Mansfield ſaid It was reaſonable to indulge Defendants with ſome Time to make their Defence, on Special Circumſtances being made out; And that if the whole Matter had appeared to him, when He gave the Defendant Ten Days, he might perhaps have granted an Imparlance.

Mr. Juſt. Denison obſerved that "Pleading iſſuably" meant Pleading ſuch *an iſſue* as the Plaintiff *might go to Trial upon*.

Mr. Juſt. Foster obſerved, that if the Ld. Ch. Juſtice had been acquainted with the whole Circumſtances of the Caſe, when he made his Order for Ten Days; he would have granted ſo much Time as to have carried it over the Aſſizes.

The Matter ended at laſt in a Rule *by Conſent*: And the Witneſſes were to be examined before Commiſſioners &c.

Rex

Rex *verſ.* Corporation of Wigan; or Rex *verſ.* Curghey Eſq; et al'.

UPON a Vacation in a Corporation, if a proper Application for a *Mandamus to go to Election* be made and granted, It is NOT *of Courſe*, That any *other* like Motions may be made *by* OTHER *Parties*, for the ſame Thing: But if there be a *reaſonable Cauſe to ſuſpect* "That the Party "who firſt moved for it, does not *really mean* to carry it "into Execution," *this* muſt be particularly laid before the Court by *Affidavit*; and then a Rule ſhall be made "to "ſhew Cauſe." Which Method was taken in the preſent Caſe, where the other Party had made a Prior Application: For, upon Affidavits of particular Circumſtances, a Rule was made, on Mr. *Aſton*'s Motion, to ſhew Cauſe why a Croſs-*Mandamus* ſhould not iſſue, to be directed to *William Curghey* Eſquire, commanding Him to hold a Court Leet, in order to go to the Election of a Mayor.

Mr. *Morton* and Mr. *Winn* now ſhewed Cauſe againſt this Rule, and why the laſt Applier ſhould *not* have a *concurrent Mandamus*, to command the Corporation of *Wigan* to go to the Election of a Mayor. They cited *Rex* v. *Corporation of Scarborough*, *M.* 1753. *Rex* v. *Corporation of Haſlemere*, *M.* 1753.—Both which Caſes turned upon this ſingle * P. 783. Queſtion, "Whether there was any reaſonable CAUSE "*to ſuſpect* that the Party who firſt applied for the *Manda-* "*mus*, did *not really mean* to carry it into Execution." Now here, They ſaid, was no ſort of Ground for any ſuch Suſpicion; Nor was there, in Fact, the leaſt Intention of that kind.

And they added, that if the Application for a ſecond Writ was at all proper, Yet it would be improper to *ſpecify the Direction* of it to the *Particular Perſon named in* the *Rule*.

Mr. *Aſton*, Mr. *Yates*, and Mr. *Campbell*, *contra*, inſiſted that *They* were the *firſt Appliers* for a *Mandamus* "*to* "*hold a Court Leet*," in Order to go to the Election of a Mayor.

The Caſe of *Scarborough* was *only quia timet*: And the Motion was, for *that* reaſon *only*, denied by the two Judges then in Court.

They relied on the *Act* of 11 *G.* 1. *c.* 4. Which, they ſaid was a very *plain Rule* to go by. In *Eveſham*, *P.* 6 *G.* 2. *B. R.* on the Death of an Officer of the Corporation, *Croſs Mandamuſſes* were moved for, on the ſame Day.

As

As to the particular Direction of the preſent concurrent Writ—The Court do very often *expreſsly* direct the *Mandamus* to *particular* Perſons *by Name*. *M.* 9 *G.* 2. *Rex* v. *Burrough of Oroford B. R.* 1737, was ſo; and was a Croſs *Mandamus*, *without* Affidavit.

And it is *rightly directed* to *Curghey*, *by Name*. *H.* 9 *G.* 2. *B. R. Rex.* v. *Matthew Manning*, in *Thetford*, was directed to him *by Name*: And many other like Inſtances. There was another, which was expreſsly directed to Lord *Arundel* of *Wardour*, or to his Steward, to hold a Court Leet; This was in 1753 and 1754; *Rex* v. *Williams* was the Name of the Cauſe.

Their Mandamus is to the Corporation: *Ours* is under the third Clauſe of 11 *G.* 1. *c.* 4. and is to be directed to One particular Perſon, *viz.* the Perſon who ought to hold the Court Leet. They ſaid, They only wanted to be *ſecure* of an Election *within the Year*.

Lord MANSFIELD—

The Queſtion ſeems to be now taken up, (though not before diſputed,) "Whether theſe *Croſs* or *Concurrent* Writs "of *Mandamus* are to be granted *of Courſe*, without ſome "ſpecial and *particular* Reaſon." And therefore

* P. 784. * I will conſider it, upon the *Precedents*; upon the Circumſtances of *this* Caſe; and upon the *Reaſon* of the Thing.

The Priority of Application to the Court for the Writ of *Mandamus* to go to an Election, is generally caſual and accidental. Where, (as in the preſent Caſe) it depends upon the Entering up the Judgment of *Ouſter*, the Proſecutor has ſome Advantage, by knowing the preciſe Time when the Judgment of Ouſter was ſigned.

It has been now urged, as it ſeems to Me, from the two Precedents of *Oreford*, and of *Eveſham*, "That Croſs or "Concurrent Writs of *Mandamus* to go to Corporate "Elections, are to be granted of *Courſe*." Theſe two Inſtances paſſed without Argument or Oppoſition: Whereas the two *ſubſequent* Precedents cited on the other Side, *viz.* thoſe of *Scarborough* and of *Haſlemere*, were debated and fully conſidered. And it is not the Courſe of the Court, (as the Maſter reports to Us,) to grant Croſs or Concurrent Writs of *Mandamus*, *of Courſe*, without *ſpecial* Reaſons.

If there is a *Ground of Suſpicion* laid, "That the party "firſt applying for ſuch a Writ does *not mean to execute it*," It is reaſonable to grant the *Carriage* of another *like* Writ to the other Side. But here is *no* ſuch Ground laid, nor is there

there any reaſon at all to ſuſpect it: On the contrary, they undertake peremptorily to execute the Writ which they have applied for. But there is *another Ground* laid in the preſent Caſe, and a very material One too; *viz.* a Doubt Whether they will execute it effectually and legally, by *directing their Writ* to the *proper* Perſon. The Court cannot take upon themſelves, previouſly to iſſuing the Writ, to determine "*to whom* it ſhall be directed." That may depend upon the very Queſtion to be tried. The Court do not uſe to ſpecify by Name, to *whom* the Writ of *Mandamus* ſhall be directed.

If We ſhould grant Writs to *both* Parties, it would occaſion not only *double Expence* and *double Trouble, but double Elections*: Which would be infinitely inconvenient to Corporations, and could not be prevented under ſuch double Writs.

The very Words of 11 *G.* 1. *c.* 4. ſhew that it would be determining the Right before-hand, if We ſhould Order *to whom* the Writ ſhall be directed.

As to the Cauſe of Suſpicion *here* Offered, The Affidavits are extremely looſe, and built upon mere Imagination. Therefore there is no ſufficient Ground for granting two Writs in this Caſe.

* Mr. Juſt. DENISON concurred in general: And He was particular in declaring Two things; *viz.* 1ſt. That the Granting two concurrent Writs of *Mandamus* "to go to "Corporate Elections," is *not a Matter of Courſe* to be done without *Special* Reaſon; And 2dly. That the Court are not particularly to ſpecify "*to whom* the Writ ſhall be di-"rected." And he mentioned a Caſe of *Rex* v. *Nance**. * P. 785.

He was Mayor of *Grampound*, about 14 *G.* 2. 1741.

Mr. Juſt. FOSTER alſo concurred. He ſaid It was *at the Peril* of the Perſon who deſires the Writ, to direct it to *a proper* preſiding Officer: And He cited the Caſe of *Carmarthen*, where the Court would not ſpecify, in particular, the Perſon to whom it would be directed.

Mr. Juſt. WILMOT likewiſe concurred clearly, "That "it was *neither right in itſelf*, nor the *Practice* of the Court, "to iſſue Concurrent Writs without *ſpecial Reaſon*." And ſo He ſaid' were the Caſes of *Scarborough* and *Haſlemere*. And here, He ſaw *no ground of Suſpicion* "That the firſt "Applier did not mean to execute it fairly."

And as to the Court's giving particular Inſtructions about the Perſon *to whom* the Writ ſhould be directed; it was not uſual, nor in this Caſe proper: For it might be in many Caſes,

Caſes, and would be in this, a *Prejudging* the Right of the Electors, *before the proper Time*, and in an *improper Manner*.

Per Cur. unanimouſly,
RULE DISCHARGED.

Monday 28th *May* 1759.

Rex *verſ.* Benjamin Cox Eſq;

THE Court had granted a Rule for the Defendant, a Juſtice of Peace for the County of *Middleſex*, to ſhew Cauſe Why an Information ſhould not be granted againſt him, for *refuſing to receive* an Information, regularly and duly laid before him, againſt a *Baker* for exerciſing his *Trade on a Sunday*, contrary to the Statute of 29 *Car.* 2. *C.* 7. (" for the better Obſervation of the Lord's Day;") Mr. *Cox* giving it as a Reaſon for his Refuſal, " That the " Juſtices of *Middleſex* and of *Weſtminſter* had come to ſuch " an Agreement amongſt themſelves, not to receive ſuch " Informations."

They laid the Streſs of the Caſe upon the Juſtices *Refuſal to receive* the Information at all: Though

* P. 786. * Mr. Juſt. FOSTER, on the Original Motion, thought that there was no Need to *receive* it, if the Juſtice was of Opinion, upon its being opened to him " That the Caſe " ſtated to Him was *not* an Offence within the Act." And He intimated his *own* Opinion, pretty ſtrongly, " that it " was *not ſo*; and that it was better that *One* Baker and " his Men ſhould ſtay at Home, than *many* Families and " Servants." He ſaid He was as much for the Obſervation of the Sabbath, as any One: But He did not think a Phariſaical or a Jewiſh Obſervation of it to be neceſſary.

Lord MANSFIELD likewiſe, at the ſame Time, hinted His Opinion " that the Sabbath would be much more ge- " nerally obſerved by a Baker's ſtaying at Home to bake " the Dinners of a Number of Families, than by his going " to Church, and thoſe Families or their Servants ſtaying " at Home to dreſs Dinners for themſelves."

However, They All agreed that it would be by no Means amiſs, that the Juſtices at *Hicks's Hall* ſhould have an Opportunity of knowing the *Opinion of this* Court upon this Subject: And (for that Purpoſe principally, as it ſeemed to Me,) they granted a Rule to ſhew Cauſe.

Mr. Serj. *Nares* and Mr. *Stowe* now ſhewed Cauſe; and obſerved that the Charge was not for baking *Bread*, but for baking Puddings, Pies, and other ſuch Things for *Dinner*. And that the Act of 29 *C.* 2. *c.* 7. §. 3. allows of *dreſſing*

dreſſing Meat, on a *Sunday*, for Dinner; And excepts Works of *Neceſſity* and Charity.

And all the Juſtices of Peace of *Middleſex* and *Weſtminſter* have agreed that *this* is not an Offence which that Statute meant to puniſh. And this Gentleman, Mr. Cox, *heard* the whole Complaint; and then declared the Opinion of himſelf and of his Brethren, "That it was *not* an Of-"fence within the Meaning of the Act of Parliment or any "other Law: For that he and the other Juſtices conſidered "it as a Cook's Shop, and as a Matter of *Neceſſity*, and of "Relief to poor People."

Mr. *Norton*, Mr. *Morton*, and Mr. *Aſhurſt contra*, for the Information, cited two Caſes, of *Rex* v. *Sergeſon*, *and Rex* v. *Dawſon*.

This does not appear, they ſaid, to have been a baking for the *Poor only*, or for the *Poor at all*; Which cannot be preſumed: So that it does not appear to be a Work of Charity or Neceſſity. Nor is it to be ranked under the Appellation or Nature of a Cook's Shop; and conſequently not within the Proviſo of the third Section.

* The Words of the Act are "That no Tradeſman, Ar- * P. 787.
"tificer, Workman, Labourer, or other Perſon what-
"ſoever ſhall do or exerciſe any worldly Labour, Bu-
"ſineſs or Work of their ordinary Callings upon the
"Lord's Day or any Part thereof; (Works of Neceſ-
"ſity and Charity only excepted.")

§ 3. "Provided, That nothing in this Act contained,
"ſhall extend to the prohibiting of dreſſing of Meat in
"Families, or Dreſſing or Selling of Meat in Inns,
"Cook's Shops, or Victualling-Houſes, for ſuch as
"cannot otherwiſe be provided."

Lord MANSFIELD—The Complaint now appears to have been founded upon a Miſrepreſentation of the Fact: for the Affidavit charges this Juſtice of Peace to have refuſed *receiving* the Information; and that He told them the Juſtices had come to an agreement "not to grant Warrants againſt "Perſons for *baking* on a *Sunday*"; Whereas it now appears that He *did hear* the Charge: and that it was *not baking in general* on a *Sunday*; but baking *Pies Puddings* and *Meat for Dinner*; not ſaying a Word about *Bread*, which is the Buſineſs of a Baker's ordinary Calling. And He told them "That THIS *Sort* of baking or *dreſſing Meat* on a "*Sunday* was not, in his Opinion and in the Opinion of the "reſt of the Juſtices, an Offence within the Act." I am not ſatisfied that their Opinion was wrong. And if he *really* judged it not to be within the Proviſion of any Law, and had conſulted

conſulted his Brethren who thought ſo too, the Court would never grant an Information againſt him; even though ſuch Opinion had been erroneous.

Mr. Juſt. DENISON—This Court will never grant an Information againſt a Juſtice of Peace for a mere Error in Judgment. And He declared that He thought the Juſtices to be in the Right in their Opinion; and that this was *not* a Caſe within the Meaning of the Law: It ſeems to be within the *Equity*, though not within the Words of the Proviſo of Section, 3. Therefore the Rule ought to be diſcharged.

Mr. Juſt. FOSTER concurred, that the Rule ought to be diſcharged. He was clear that this Caſe was not within the Proviſion of the Act: But it falls within the Exception of Works of Neceſſity and Charity, and alſo within the Proviſo, as being a Cook's Shop. And it is as reaſonable that the Baker ſhould *bake* for the Poor as that a Cook ſhould roaſt or boil for them: There is no Reaſon for any Diſtinction.

And as the Juſtice has acted rightly, and alſo upon right Motives, the Rule ought to be diſcharged *with Coſts*.

* P. 788. * A Juſtice of Peace has a Right to judge for Himſelf, Whether the Matter charged is an Offence within the Law: And if upon hearing the Charge opened, he thinks it *not* to be an Offence within the Law, he ought not to proceed upon it; which could be to no Purpoſe but merely to put Perſons to unneceſſary Trouble and Charge.

Mr. Juſt. WILMOT—It comes out now, that the Juſtice did *not* refuſe to *hear* and *receive* the Complaint; though when it was opened to Him, he judged that He ought not to *proceed* upon it. And in this He judged *right*: For it is not an Offence within the Proviſion of the Act; It is particularly within the Equity of the Exception of *Cooks Shops*.

Therefore I think the Juſtice had no *Juriſdiction* to proceed upon the Complaint. I think that no Juſtice of Peace ought to be puniſhed by an Information, for an Error in Judgment. But I think that the Juſtice was in the *right*, in the preſent Caſe: And therefore that the Rule ought to be diſcharged *with Coſts*.

Per Cur.

RULE DISCHARGED, with COSTS.

Rex

Rex *verſ.* Inhabitants of Nether Heyford.

This CASE is *abridged*, in the TABLE: And it may be ſeen at *large*, in the Quarto Edition of my SETTLEMENT-CASES, Page 479. N°. 152.

The End of *Eaſter* Term 1759, 32 *G.* 2.

Trinity

* P. 792.

* Trinity Term

32 & 33 Geo. 2. B. R. 1759.

Saturday 16th *June* 1759.

Rex *verſ.* Beardmore, (Under-Sheriff of *Middleſex.*)

MR. Attorney General had moved (on *Monday* the 29th of *January* laſt) for an *Attachment* againſt *Arthur Beardmore*, the Under-Sheriff, for a *Contempt* of the Court, in taking upon himſelf, without any Pretence of Authority, *to* REMIT *Part of the Sentence* pronounced upon *John Shebbeare* in *Michaelmas* Term laſt: One Part of this Sentence was "That the Defendant *John Shebbeare* be ſet IN *and* "*upon* the Pillory."

And ſeveral Affidavits were then produced by Mr. Attorney General, which were very full in aſſerting "that the De- "fendant only ſtood *upon the* Platform of the Pillory, un- "confined and at his Eaſe, attended by a *Servant* in *Livery*, "(which Servant and Livery were hired for this Occaſion "only,) holding an Umbrella over his Head, all the Time: "But his *Head*, *Hands*, *Neck*, and *Arms* were NOT *at all* "*confined* or put *into* the Holes of the Pillory; only that he "ſometimes put his Hands *upon* the Holes of the Pillory, in "order to reſt himſelf." And it was proved "that Mr. "*Beardmore* attended as Under-Sheriff; with his Wand; "and that He treated the Criminal with great Complaiſance, "in taking him to and from the Pillory."

A Rule was thereupon made to ſhew Cauſe why an At tachment ſhould not iſſue againſt Mr. *Beardmore*, the Under-Sheriff.

On *Thurſday* 8th *February* 1759, Mr. *Morton*, Mr. Serj. *Davy*, and Mr. *Howard* ſhewed Cauſe.

Mr. *Beardmore's* Affidavit ſhewed, that his officiating at all in this Affair was quite *caſual* and *unexpected*, on a ſudden Meſſage from his Brother Under-Sheriff. It was as full and explicit as poſſible, "That he had no Sort of *Deſign* or *In-* "*tention*, either directly or indirectly to favour *Shebbeare*; "that

" *that he gave no particular Direction to his Under-Officers * P. 793.
" about it, but *meant* and *intended* that this Sentence ſhould
" be executed in the *uſual* and *ordinary* Manner, as other
" Sentences of the like Kind were and *uſed* to be executed;
" and that He ſtood at a Shop oppoſite the Pillory, during
" the whole Time, without almoſt ever taking his Eyes off
" from it during the whole Time, in order to ſee the Sen-
" tence *properly* executed; and that He *would have obliged*
" him to ſtand in what He, (Mr. *Beardmore*,) *took to be the*
" *proper* Manner, if *Shebbeare* had offered to withdraw him-
" ſelf from ſuch Poſition" And he poſitively ſwore " That
" according to the beſt Information he could get, *He looked*
" *upon* the Manner in which *Shebbeare* ſtood, *to be the*
" USUAL *and* PROPER Manner of Standing, *purſuant to*
" Rules worded as this Rule is: And that he did according
" to the *beſt of his Judgment*, fully and duly execute the
" Judgment of the Court in the *uſual* and *common* Manner."

And he produced 14 or 15 Affidavits, proving that the manner in which *Shebbeare* actually ſtood, was with his *Hands in and* THROUGH *the ſmall Holes*, and his *Head and Face* FULLY EXPOSED *through* (ſome of them ſaid *in* and through) the LARGE *Hole:* And that he ſtood ſo, *during* the WHOLE Time, that the Rule required him to ſtand.

And ſeveral of the Deponents (Sheriff's Officers and Others) ſwore poſitively, that the Standing *without confining the Head*, was the *uſual ordinary* Manner, and had been ſo for 30 or 40 Years, in *Middleſex*, of Criminals ſtanding purſuant to Rules of this Kind; and that it had been uſual in that County, *not* to faſten or confine the Head in the Pillory, for a great *many Years backwards*, and ever ſince One or Two Perſons who were locked down in the Pillory had been killed: And ſeveral of them particularized how much Inconvenience might follow from *faſtening* it down upon the Head. And two of the Sheriff's Officers ſwore " That they always deemed and conceived it to be a full " Execution of the Words of the Rule, to ſtand as this Man " ſtood, with the Hands in, and the Head and Face *expoſed* " *through* the Holes of the Pillory."

But Mr. *Beardmore* and his Counſel admitted (or at leaſt did not pretend to contradict) that his *Arms* were not put through the ſmall Holes, and that the Pillory was NOT *ſhut down* upon *Shebbeare*, nor his HEAD *abſolutely* THRUST THROUGH *it:* Which the Sheriff's Officers ſwore they did not apprehend to be neceſſary or uſual, unleſs the Perſon was *refractory*. Neither indeed was it pretended, that the *upper* Board of this Pillory was at all *let down* over his Neck.

* P. 794. * Mr. *Howard* obſerved, (amongſt other Things), that the Sentence of *quartering* and *burning the* BOWELS of Traitors is *never ſtrictly executed*, nor the Puniſhment of *burning in the Hand*, which is conſtantly and notoriouſly done in the *Face* and with the *Knowledge* of the *Judges themſelves*, with a *cold* Iron.

Lord MANSFIELD—If the Charge be true, it is admitted that ſuch a Diſobedience to the Rule of the Court, by their own Officer, is puniſhable in this *ſummary* Way.

The Fact charged is "That by the Permiſſion and under "the Inſpection of the Under-Sheriff, the Criminal ſtood "upright and erect upon the Platform of the Pillory; and "that his Head, Neck, Arms or Hands were *not* put "THROUGH the Holes of the Pillory; nor his Head even "inclined to it."

As to the Defence which Mr. *Beardmore* has ſet up,—It would have been more judicious to have made no Defence at all, than ſuch a one as this. The attempt to juſtify, upon Oath, the Offenders Standing *Upright*, as a *Legal* Execution of the Sentence, is an Aggravation: It is contrary to every Man's Conviction; And the Form of a Pillory alone demonſtrates what is meant by being ſet *in*, as well as *upon* it. The Offender was no more *in* the Pillory, than the Footman who ſtood by him.

Then as to the other Part of the Defence, the *Uſage*—There is *not a ſingle Inſtance* particularized or ſhewn of this kind; or to prove that there has been ſuch a Uſage.

None of his Affidavits ſwear, that the Method now taken was the *uſual* and *ordinary* Method; though two of them ſay they conceive it to be a full Execution of the Rule. They only ſay "that it was not uſual or cuſtomary for many "Years backward, in *Middleſex*, to *faſten or confine* the "Neck in the Pillory:" And they give the Reaſon of it too, and mention ſome Inconveniences of *that* Method.

One of them ſays that this Man ſtood as he had *uſually* ſeen others do: But he *ſpecifies no Inſtances*. *Revie*, One of the Perſons who makes Affidavit, ſays he has known this Practice about ſetting in the Pillory forty Years, having lived ſo long near *Charing Croſs*: And he *never ſaw* a Criminal *ſo publicly expoſed* in and upon the Pillory before, as this Man was. To be ſure The Face of a Man who ſtands upright, is more expoſed to View, than it would be if his Head were bent down and put *in* the Pillory. And therefore, though the *Words* of the Affidavit are artfully drawn, to convey another Meaning, the Mental Reſervation of the Swearer guards Him from

* from Perjury, ſuppoſing the Fact to be that He never ſaw a Man ſtand upon the Pillory before, in the manner that *Shebbeare* did. * P. 795.

So many Affidavits, ſo ſtudiouſly and artfully penned, to be ſafely ſworn in One Senſe and read in another, are an Aggravation.

And therefore the Rule ought, in my Opinion, to be made abſolute.

Mr. Juſt. DENISON concurred.

Nothing imports Us more, than to ſee that the Judgments of the Court be *duly* executed.

Now no Miniſterial Officer, or any One that has ſeen a Pillory, can doubt about the Meaning of ſetting a Criminal IN the Pillory. The very Form of the Pillory ſhews what it muſt mean. And it cannot be pretended that Standing *erect* UPON the Pillory, is being ſet IN it.

If there had been ſuch a Uſage in *Middleſex*. it was high Time to put a Stop to it. But here is no ſuch Uſage *proved*.

Therefore the Under-Sheriff ought to anſwer upon Interrogatories.

Mr Juſt. FOSTER concurred: And he conſidered this Affair, as highly concerning the Honour and Dignity of the Court, and the effectual Execution of Juſtice. Mr. *Beardmore* cannot think, nor will he venture to ſay, upon his Examination on Interrogatories, " that this is the uſual Method " of putting Offenders *in* the Pillory."

Mr. Juſt. WILMOT alſo concurred, that this Inquiry was a Matter of the higheſt Importance to the Honour of the Court, and the due Execution of the Sentence on Offenders; and that this Offence is of the moſt pernicious Tendency; Nothing being of worſe Conſequence, than that an Officer of the Court ſhould combine with a Criminal to fruſtrate the Sentence of the Court.

He mentioned a Paſſage that occurred to him upon this Occaſion, Which He remembered to have met with in the Year-Books, and which is quoted in the Mayor of *Oxford*'s Caſe in *Palmer* 454: Where the Reaſon given in the Record, for the Plaintiff's recovering a large Sum in a Special Action againſt the Defendant for beating him, being his Adverſary's Attorney, was " Quia the Defendant, *quantum in ſe fuit*, " non permiſit Regem regnare." And it may be, with at leaſt

* P. 796. * as much Propriety, ſaid of this Under-Sheriff in the preſent Inſtance, " that quantum in ſe fuit, non permiſit Regem " regnare."

And He expreſsly declared " that in Order to execute the " true Intent and Meaning of this Rule, the Head and " Hands ought to be put *in* AND THROUGH the Pillory, " and remain ſo *during the whole Time*."

Mr. *Beardmore* does not ſwear that he ever *ſaw* a Sentence executed in *this* Manner: Nor do his Affidavits ſpecify any Inſtance of it. He inquired into the Manner of executing the Sentence, only in order to elude it: No Man *could* doubt how it *ought* to be executed.

I think his Defence makes his Caſe worſe, rather than mends it.

Therefore He was clearly of Opinion with His Lordſhip and the Reſt of his Brethren, " that the Attachment ſhould " iſſue againſt Mr. *Beardmore*."

The WHOLE COURT, commended Mr. Attorney General for bringing this Complaint before them; as the Honour and Dignity of the Court, and the End and very Eſſence of Juſtice were ſo materially concerned in the due and regular Execution of their Sentences.

Per Cur. unanimouſly, Rule for the Attachment made abſolute.

On the *Monday* following, (*viz.* 12th *February* 1759,) the Defendant appeared, and gave Bail to anſwer Interrogatories; and was ſworn to make true Anſwer thereto.

N. B. HE HAD *given Notice* " that he would come in and " *confeſs* the Contempt, and *ſubmit* directly to the Judg- " ment of the Court." But this Notice was withdrawn; his Counſel being ſatisfied that this could not be done within the * Courſe of the Court; eſpecially as this was not a mere ſingle Fact, but a complicated Charge, ariſing from ſeveral Circumſtances."

* *V. poſt.* accord.'

Lord MANSFIELD ſaid they were certainly right in withdrawing their intended Motion.

And Mr. *Morton*, of Counſel for the Defendant, ſaid that this ſame Thing was formerly attempted in Dr. *Colebatche*'s Caſe (who would immediately have come in and ſubmitted to the Judgment of the Court:) But he was obliged to be examined upon Interrogatories.

The

* The Defendant accordingly gave Bail, (Himſelf in 200*l.* and Each of his two Sureties in 100*l.*) to appear and anſwer to Interrogatories; And then was ſworn to make true Anſwer to ſuch Interrogatories as ſhould be exhibited againſt him. * P. 797.

And after having been examined, the Interrogatories and Examination were referred to me, as uſual: And I made my Report. The Examination was much to the ſame Effect as his Defence upon his Affidavits. And the Rule was as follows—

Saturday next after the Morrow of the *Aſcenſion &c*, 32 *G.* 2. (26th *May* 1755.)

Upon hearing the Report of *James Burrow* Eſq; Coroner and Attorney of this Court, It is adjudged by this Court, "That the Defendant is *in Contempt:*" It is thereupon Ordered "That He be *committed* to the Cuſtody of the Mar-"ſhal of the *Marſhalſea* of this Court." *But by Conſent* of his Majeſty's Attorney General, It is Ordered that the ſaid Defendant be *continued upon his Recognizance*; And that he the ſaid Defendant do perſonally appear in this Court on the ſecond Day of next Term, to receive the Judgment of this Court. It is thereupon further Ordered that he the ſaid Defendant be now diſcharged out of the Cuſtody of the ſaid Marſhal.

The Defendant now perſonally appearing in Court purſuant to the laſt Rule—

Mr. Juſt. DENISON pronounced the Sentence.

He firſt expatiated upon the Offence. In doing which, He declared, that it was at the Sheriff's Peril, to execute the Rule of the Court in a *proper* Manner; And that no One could poſſibly doubt that the Suffering a groſs Offender, an infamous Libeller of the King and Government, to ſtand *in Triumph*, erect upon the Pillory, with a Servant holding an Umbrella over his Head, inſtead of Standing with his Head *in* the Pillory, by Way of Diſgrace and *Ludibrium* (which is the Intent of this kind of Puniſhment,) was a highly *improper* and *inſufficient* Manner of executing this Rule of the Court.

After which, He gave the Sentence upon the Defendant *Beardmore*, for this his Contempt; *viz.*

To pay a *Fine of* 50*l.* and to be * *committed* to the Cuſtody of the Marſhal, for 2 Months, and till the Fine ſhall be paid.

* He was ſtill Under-Sheriff at this Time.

Rex

* P. 798.

Tuesday 19th *June* 1759.

* Rex *verſ.* Mayor and Jurates of Rye.

SIR *Richard Lloyd* ſhewed Cauſe why an *Attachment* ſhould not iſſue againſt the *Mayor* AND *Jurates*, for not returning a *Mandamus* directed to them; commanding them "to admit and ſwear *Edwin Wardroper* into the Office of "One of the Jurates of that Corporation; or to ſhew Cauſe "*why they refuſe* to admit him."

His Cauſe was, "that it was not poſſible for them *jointly* "to make *any* Return at all." For the Mayor claims a ſole and excluſive Right to nominate this Jurate; And the Jurates deny that the Mayor has any ſuch ſole and excluſive Right: So that it is impoſſible for the Mayor and Jurate to *join* in any Return; unleſs either the One or the Other ſhould *give up* the Right which they inſiſt upon. The Jurates would return "*Non fuit electus*:" But the Mayor refuſes to join in this Return; becauſe He ſays that the Jurate *is* duly choſen; And the Jurates can *not force* him to *join* in *their* Return. Therefore it would be hard to puniſh the *innocent* promiſcuouſly with the guilty.

Sir *Richard* was for the *Jurates*; and he offered to put the Right into any Method of Trial: But He ſaid they could not give up their Franchiſe. It may be tried, either upon a Return of "*Non fuit electus*," or upon a feigned Iſſue. We are not perverſe and obſtinate; but lie under a real honeſt Difficulty: We cannot pay Obedience to the Writ, conſiſtently with our Oaths.

And an Atttachment will anſwer no End or Purpoſe; For if an Attachment ſhould go, and the Defendants ſhould be examined upon Interrogatories, it would come out to be a *mere Queſtion* of RIGHT.

Note—The Right claimed by the Mayor was "to fill up "the Vacancy of Jurates happening during his Year, "*generally*:" But the Jurates deny that the Mayor has ſuch a Right, *generally*; though they admit that he has it upon the *ſingle Day* of his Election; but not afterwards, (as they alledge.)

It ended in a Rule by Conſent, to try the Right in a feigned Iſſue, at the Sittings after this Term, for *Middleſex*; on the Queſtion—"Whether *Edwin Wardroper* was duly "elected, or not:" And further, that the Books ſhall be inſpected, and Copies taken *&c*; and the Books themſelves produced at the Trial; on proper Notice *&c*; and that the Party who ſhall prevail, may be at Liberty to enter up his Judgment as of this Term.

V. 6 *Mod.*

* *V.* 6 *Mod.* 152. *Domina Regina* v. *Chapman*, late Mayor of *Bath:* (7th Point.) *Comberb.* 373. Caſe of *New Sarum. Rex* v. *Church-Wardens and Overſeers* of *St. Chad's*, *H.* 8 *G.* 2. *B. R.* reported in *Lucas* 56. * P. 799.

Priſoner's Caſe.

Wedneſday 20th *June* 1759.

LORD MANSFIELD declared, it was the Opinion of *All* the Judges, upon a Conſultation had among them, "That the late Act of 2 *G.* 2. *c.* 22. (for the Relief of Inſolvent Debtors with reſpect to the Impriſonment of their Perſons (being *expired*, Nothing further can be done upon *that* Act: But that they are within the Proviſion of the *new* Act."

And the Court declared to thoſe now preſent in Court, That they muſt *immediately* give Notice purſuant to the * *new* Act: For that this new Act requires 14 Days Notice; and there are only 14 Days of the Term now remaining. * 32 *G.* 2. *c.* 28. §. 13.

Mr. Juſt. DENISON obſerved that the Judges came to a like Reſolution upon the Expiration of the former Act, as they are come to now, [*V. ante* 747, 748.]

Note—That Act of 2 *G.* 2. *c.* 22. was a temporary Act: Which was explained and amended by an Act of 3 *G.* 2. *c.* 27. and continued by 8 *G.* 2. *c.* 24. and 14 *G.* 2. *c.* 34. (which perpetuates the Clauſe of ſetting † mutual Debts One againſt the Other;) and again amended and continued by 21 *G.* 2. *c.* 33. and finally revived and continued by 29 *G.* 2. *c.* 28. until the *firſt* Day of *June* 1759. So that *this* Act *expired on the 1ſt of June.* But the late Act, of ‖ laſt Seſſion, does not COMMENCE till the 15th of the ſame *June*. Conſequently there is a CHASM of 14 *Days*. † See this Point of ſetting off *mutual Debts*, and theſe Acts of 2 & 8 *G.* 2. and alſo that of 8, 9 *W.* 3. *c.* 11. §. 8. moſt fully clearly and ſatisfactorily explained by Lord *Manſfield*, *Poſt* 28th *November* 1759. *pa.* 901. *Young* v. *Diego Arines.* ‖ 32 *G.* 2. *c.* 28.

Rex *verſ.* Robert Robinſon, Clerk.

February 22d *June* 1759.

THIS was a Motion in *Arreſt of Judgment*, upon an INDICTMENT againſt the Defendant for *refuſing to obey an Order of the General Quarter Seſſions* for the County of *Stafford* made upon him for his keeping and maintaining *James* and *Peter Robinſon* his two Infant Grand Children: In which, the Breach was laid according to 43 *Eliz. c.* 2. §. 7.

It

* P. 800. * It came on, no leſs than four Times, before the Court.

The Indictment recites an Order of Seſſions made on the 11th of *January* 1757, 30 G. 2. * directing "That the Defendant *Robert Robinſon* ſhould, from the Date thereof, "Weekly and every Week pay or cauſe to be paid unto "the Overſeer of the Poor of the Pariſh of *Waterfal* for "the Time being, the Sum of 2*s.* for the Relief and "Maintenance of his ſaid Grand-Child *James Robinſon*; "and the like Sum of 2*s.* for the Relief and Maintenance "of his Grand-Child *Peter Robinſon*; and to continue ſuch "reſpective Payments until further Order." With which Order the Defendant was duly and legally ſerved, on 21ſt of the ſame *January*.

N. B. The Order recites the Death of the Father of theſe Children; their being deſtitute of Subſiſtence; the Complaint of the Pariſh; the Ability of the Grandfather, to maintain them; and other proper Foundations for ſuch an Order; And that the Facts were, by proper Evidence, made to appear to the Juſtices at Seſſions.

And the Charge is, "that the Defendant not regarding "the *ſaid Order nor the Laws and Statutes of this Realm* "*relating to the Relief of the Poor* of this Kingdom, did "not on 21ſt *January*, 30 G. 2. nor hath ſince the Date of "the ſaid Order, Weekly and every Week or otherwiſe "howſoever, paid or cauſed to be paid unto the Overſeer "of the Poor of the ſaid Pariſh of *Waterfal* for the Time "being, either the ſaid Sum of 2*s.* for the Relief and "Maintenance of the ſaid *James Robinſon*, or the like "Sum of 2*s.* for the Relief and Maintenance of the ſaid "*Peter Robinſon*, or any Part of either of the ſaid Sums; "nor hath he the ſaid *Robert Robinſon*, at any Time or "Times from or ſince the Date of the ſaid Order, relieved "maintained or provided for them the ſaid *J. R.* or *P. R.* "or either of them, according to Law; But he the ſaid "*R. R.* upon the ſaid 21ſt Day of *January* 30 G. 2. and "continually afterwards, until the Day of the taking the "Inquiſition, unlawfully wilfully obſtinately and contemp-"tuouſly did and yet doth *neglect and refuſe* to pay or cauſe "to be paid unto the Overſeer of the Poor of the ſaid "Pariſh of *Waterfal* for the Time being, Weekly and "every Week from the Date of the ſaid Order, the ſaid "ſeveral and reſpective Sums abovementioned, contrary to "the Purport and Direction of the ſaid Order, and in "manifeſt Breach and Contempt of the ſame; To the "great Damage of the Inhabitants of the ſaid Pariſh of "*Waterfal*, To the evil and pernicious Example of all "Others in the like Caſe offending; and alſo againſt the "Peace of our ſaid Lord the King his Crown and Dig-"nity."

The Indictment was found at a Quarter Seſſions holden the 12th of *July* 31 G. 2. The Defendant had been convicted upon it; and Judgment ſigned, as *poſt. pa.* 801.

On *Monday* 5th *February* 1759, Mr. *Morton* moved an Arreſt of Judgment.

This

* This is a † NEW *Offence*, with a *particular Penalty*: And Section 11th of 43 *Eliz. c.* 2. preſcribes a very *ſummary* Method of recovering the Penalty. Therefore 'tis *not indictable*. 6 *Mod.* 86. *Watſon*'s Caſe, and *Caſtle*'s Caſe; and *Cro. Jac.* 643. *Caſtle*'s Caſe: Both which Caſes are expreſs, "that where a Statute *creates a* NEW *Offence*, and "gives a *particular Penalty*, the Party ſhall *not* be puniſhed "by *Indictment*." Now here, the 7th Section gives a particular Penalty, *viz.* "Upon Pain that Every One of them, "ſhall forfeit 20*s.* for every Month which they ſhall fail "therein:" And the 11th Section directs how that Forfeiture ſhall be levied and employed.

* P. 801. Objection.
† *V. ante*, *Pa.* 543. *Rex* v. *Wright*, Clerk, *P.* 1758. 31 *G.* 2. 1ſt Obj. S. P.

But it being litigated by the Other Side, previouſly to their ſhewing Cauſe. "Whether the Motion in *Arreſt of Judg*-"*ment* was made WITHIN *Time*;"

The Secondary certified, (on *Thurſday* the 3d of *May* laſt,) And

The COURT then held, (notwithſtanding the Caſe in 1 *Salk.* 78. *The Queen* v. *Darby*, which ſeems contrary,) "That a Motion in Arreſt of Judgment may be made (on "the *Crown* Side) at ANY *Time* BEFORE SENTENCE "*pronounced*." For that the Judgment ſigned in the Office is only an *interlocutory* Judgment; And the Award "quod "capiatur" is only to bring the Defendant in, to receive the final Judgment or Sentence of the Court; but is *not* the final Judgment itſelf.

They obſerved that the Judgment in *Darby*'s Caſe, in *Salk.* 78. is there ſaid to be a "Capiatur *pro fine*;" and the Capias there iſſued might poſſibly be for the Fine, *after* a final Judgment.

As to the Objection in Arreſt of Judgment, It was, for the preſent, Adjourned.

On the *Monday* following Mr. *Aſton*, ſupported by Mr. *Gilbert*, ſhewed Cauſe why the Judgment againſt the Defendant ſhould not be arreſted.

They did not diſpute the Rule laid down in *Caſtle*'s Caſe; But denied that here *was* a particular Penalty preſcribed by this Act of 43 *Eliz. c.* 2. §. 7. And cited 2 *Hawk. P. C. c.* 25. §. 4. *pa.* 211. from whence they endeavoured to prove that An Indictment is not excluded unleſs it be ſo *particularly expreſſed* in the Act of Parliament.

They urged That an Indictment is the *proper* Remedy for diſobeying an Order of Seſſions. And, in the preſent Inſtance, they ſaid, the Remedy given by the Act of 43 *Eliz.* is *inadequate:* For the Child may die *within* the Month;

*P. 802. *Month; And the Forfeiture is only 20*s.* for *every Month* that they ſhall fail. Another Reaſon why an Indictment is not excluded, is becauſe if the Party liable ſhould *remove out of the County*, the Remedy given by the Statute would be of no *Effect*. And here, the Defendant in Fact did remove out of the County. They remarked that the Caſe in 5 *Mod.* 329. and 2 *Salk.* 474. S. C. *Rex* v. *Turnock* or *Turner* was exactly ſuch an Indictment as this: And no ſuch Objection was there made; but it was quaſhed upon One of quite another kind, (namely, the Omiſſion of the Word "Quar- "teriali.")

*V. Poſt 803. S. C. cited at large.

The Caſe of * *Rex* v. *Davis*, *M.* 28 *G.* 2. *B. R.* proves "that an Indictment will lie, where the Remedy is *not ade-* "*quate*." (That was an Indictment againſt a Pariſh Officer, for refuſing to receive a Pauper regularly ſent to his Pariſh.) *Rex* v. *Boys*, † *P.* 26 *G.* 2. 1753. *B. R.* proves the ſame Thing.

† *V. Poſt* 805. S. C. cited at large.

And here is *no particular Mode* preſcribed *how* the Penalty is to be ‡ levied. And the Forfeiture is not given by way of *Execution*; but in the Nature of a *new* Judgment. Here is no Remedy at all given, in Caſe the Diſobedience be in Non-payment for *three Weeks*; being only ſo much *per Month*.

‡ *V.* §. 11th, which directs it to be "levied by *Diſtreſs and Sale*; or in defect thereof, the Offender to be committed without Bail or Mainprize till the Forfeitures ſhall be ſatisfied and paid."

2 *Hale's H. P. C.* 171. ſays "That if there *be a prohibi-* "*tory* Clauſe, an Indictment will lie, Upon the *prohibitory* "Clauſe."

*But ſee the next Clauſe in the ſame Book— "That if the Act be *not* prohibitory, the particular Remedy only can be purſued."

An Indictment (it muſt be agreed) would not lie UPON *the Statute*; becauſe it gives a *particular Remedy*. But yet the Statute does NOT TAKE AWAY the *Common Law* Remedy: And the rather, as this Remedy, preſcribed by the Act, *is not an effectual and adequate* One.

This is an Indictment at *Common* Law, *for diſobeying an Order of Seſſions*; *not* an Indictment *upon the Statute*, for this PARTICULAR *Offence*.

Mr. *Morton contra*, in Reply, cited 7 *Co.* 36. *a.* where it is ſaid "That an Act of Parliament which gives a Penalty, "ought only to be followed, in the Proſecution and levy- "ing of it."

And this Act ſpecifies the Remedy, as well as makes the Offence. This is a *ſummary* Law; and is directory, "to "pay ſuch a Sum as the Juſtices ſhall aſſeſs." And the Remedy *is* adequate. The Defendant does *not appear* to be removed out of the County: This is only aſſerted, not proved. As to the ſmall Space of Time *within* the Month,

no

* no Penalty at all is incurred, *till* there is a Month's Neglect: It was not the Intention of the Statute to inflict any, till *after* a Month's Failure of Compliance with the Order. * P. 803.

CUR. ADVIS."

The Court having taken ſome Time to conſider it,

Lord MANSFIELD now delivered their Opinion.

The Objection to this Indictment is, " That the Offence " is NOT *indictable*; becauſe the Act of Parliament has ** *V.* §. 7. " pointed out a *particular Puniſhment* and a *ſpecific Method* & 11. " of recovering the Penalty which it inflicts."

The Rule is certain, " That where a Statute CREATES " *a new Offence*, by prohibiting and making *un*lawful any " Thing which *was lawful before*; and appoints a *ſpecific* " *Remedy* againſt ſuch new Offence, (*not* antecedently un- " lawful,) by a *particular Sanction* and *particular Method* " of Proceeding, *that particular Method* of Proceeding muſt " be purſued, and no other." And this is the Reſolution, in *Caſtle's* Caſe, *Cro. Jac.* 643.

But where the Offence was antecedently puniſhable by a Common-Law Proceeding, and a Statute preſcribes a Particular Remedy by a Summary Proceeding; there, *Either* Method may be purſued, and the Proſecutor is at Liberty to proceed either at Common Law, or in the Method preſcribed by the Statute; becauſe there the Sanction is CUMULATIVE, and does *not exclude* the Common Law Puniſhment. 1 *Salk.* 45. *Stephens* v. *Watſon*, was a Reſolution upon theſe Principles: In that Caſe, † Keeping an Alehouſe without Licence was held to be *not* indictable, becauſe it was *no* Offence at Common Law; and the Statute which *makes* it an Offence, has made it puniſhable in *another Manner*. † The 3d Point of it.

There was a Caſe in this Court in *M.* 28 *G.* 2. *Rex* v. *Davis*, In Arreſt of Judgment upon an Indictment againſt the Defendant, Overſeer of the Poor of the Pariſh of *St. Peter ad Vincula* within the Liberty of the Tower of *London*, for refuſing to receive and provide for *Hannah Gothridge*, a Pauper removed to that Pariſh by an Order of two Juſtices made by Virtue of 13, 14 *G.* 2. *c.* 12. by which Act the Juſtices are impowered to *remove* a Pauper to the Place of his laſt legal Settlement. But there is no Proviſion by *that* Act, to puniſh the Officer, in Caſe he *refuſes to* RECEIVE the Pauper: So that the *only* Remedy was at *Common* Law, to *indict* him. Afterwards, by 3, 4 *W.* & *M. c.* 11. It is enacted, that if an Officer *refuſe to receive* a Perſon removed by an Order of two Juſtices, he ſhall forfeit 5*l.* to be recovered in a *ſummary* Way.—It was objected,

" that

* P. 804. " * that this was Matter *not indictable*, becauſe it was a " *New* Offence created, and a *particular Method appointed* " by this laſt-mentioned Act." On the other hand it was " ſaid that notwithſtanding the Remedy given by the laſt- " mentioned Act, the Common Law Remedy, by Indict- " ment, *remains*; and the Officer of the Poor may be pro- " ceeded againſt either Way." The Court held the Offence to be INDICTABLE; and diſcharged the Rule to ſhew Cauſe why the Judgment ſhould not be arreſted: For they held the Offence to have been indictable *after* the Act of 13, 14 *C.* 2. *c.* 12. and conſequently *not a new* Offence originally created by the 3, 4 *W. & M. c.* 11 *.

* *V. Rex* v. *Boyall, Tr.* 1759, 32, 33 *G.* 2. *B. R.* 2d *July* 1759. *Poſt. pa.* 832. a like Determination to *Rex* v. *Davis.*

So, in the preſent Caſe, a Remedy exiſted *before* the Statute of 43 *Eliz:* For *Diſobedience to an Order of Seſſions* is an Offence *indictable* at *Common* Law. Here, the Relief is to be aſſeſſed and directed *by order of Seſſions:* And a particular Proceeding, in a ſummary way, is preſcribed by the Act, as a particular Sanction and Method of Puniſhment, in Caſe of Failure. But it is to be preſumed, that the Legiſlature then *knew* and *conſidered* " that *Diſobedience* " *to an Order of Seſſions* was an *Offence indictable at Com-* " *mon* Law." So that they muſt have intended that there ſhould be, and there actually are TWO Remedies in the preſent Caſe: One, To proceed by way of *Indictment for diſobeying the Order*, where the Weekly Payment is neglected or refuſed to be made; The Other, to *diſtrain* for the 20*s.* Penalty, after the Expiration of the Month.

The *former* Method has been taken, in the preſent Caſe: And there is no Doubt but that an *Indictment* WILL LIE for *diſobeying an Order of Seſſions.*

† *V. Poſt. accord'.*

But † notwithſtanding that here are *two* Remedies *given*; Yet it would be extremely OPPRESSIVE, to take the *Remedy* by *Indictment*, if there are *no* Circumſtances which *obſtruct* the Proceeding in the ſhorter way of *ſummary* Remedy: This would indeed be very wrong and unreaſonable, where the ſummary Remedy can be put in Practice.

But in *ſome* Caſes it may be *impracticable* to proceed in the ſummary Method, by way of Diſtreſs: As if the Party upon whom the Order is made, be gone out of the County, (which is ſaid to be the Caſe here;) In which Caſe, the Penalty cannot be levied by *Diſtreſs and Sale*, nor the Offender *committed* by the Juſtices.

And there may alſo be a Diſobedience to the Order even *before* the Month is out: And the Forfeiture is only 20*s.* *for every Month* which they ſhall fail. However, that would be *too ſevere*, To indict for Diſobedience to the Order,

* Order, with ſuch *very great Haſte* as not to wait till the Month ſhould be expired. * P. 805.

By 43 *Eliz. c.* 2. §. 2. It is enacted " that the old " Church-Wardens and Overſeers ſhall account for the " Money in their Hands, and ſhall pay over the Balance " to the Church-Wardens and Overſeers, *upon pain of* " *forfeiting* 20*s. for each Default.*" Yet there was a Caſe in *P.* 20 *G.* 2. *B. R. Rex* v. *Bill*, where Two Overſeers were *indicted* for not obeying an Order of Seſſions whereby they were ordered to pay over the Balance of their Accounts to the new Church-Wardens and Overſeers. * *V.* §. 4. which directs the Method of enforcing them to account and to pay over the Balance.

In the Caſe that has been † mentioned of *Rex* v. *Boys*, *Trin.* 27, 28 *G.* 2. *B. R.* there was no other Remedy but by way of Indictment. It was an Indictment before the Juſtices of the Liberty of *St. Albans* for not obeying an Order of Seſſions whereby the Defendant was ordered to pay the Coſts of an Appeal againſt a Poor Rate, which by 17 *G.* 2. *c.* 38. ‡ is to be recovered in the ſame Manner as Coſts upon an Appeal againſt an Order of Removal; which by 8, 9 *W.* 3. *c.* 30. * are recoverable by *Diſtreſs and Sale* (or Commitment where no Diſtreſs is to be had,) where the Party lives *out of* the Juriſdiction, (by Warrant of ſome Juſtice of Peace for the Place where the Party inhabits:) But *if* the Party lives WITHIN the Juriſdiction, (which *Boys* did,) there is *no other Remedy* but by way of *Indictment*. And on Demurrer, Judgment was given for the King. † *V. ante* 802. ‡ *V.* §. 4th. * *V.* §. 3d.

So that the Caſe ſeems to be exactly parallel and in Point with the preſent Caſe. For that was a Caſe where the ſummary Method could *not* be uſed; Becauſe the Defendant inhabited *within* the Juriſdiction; and the Summary Remedy is given only againſt ſuch as live *out* of the Juriſdiction: So that the *particular* Remedy *failed*; and an Indictment conſequently lay.

The true Rule of *Diſtinction* ſeems to be, That where the Offence intended to be guarded againſt by a Statute, was *puniſhable* BEFORE the making of ſuch Statute preſcribing a particular Method of puniſhing it, There ſuch particular Remedy is CUMULATIVE, and does *not* take away the former Remedy: But where the Statute only enacts " that the Doing any Act NOT PUNISHABLE BE- " FORE, ſhall *for the future* be puniſhable in ſuch and " ſuch a *particular* Manner," *There* it is neceſſary that ſuch *particular* Method, by ſuch Act preſcribed, *muſt be ſpecifically purſued*; And *not* the Common Law Method of an *Indictment*.

We

* P. 806.

* We are all of Opinion,

That the Judgment ought * NOT to be Arreſted: And therefore the Rule muſt be *diſcharged*.

* *V. Poſt.* *pa.* 832. *Rex* v. *Boyall*, (3d Objection in that Caſe,) S. P. *accord.*

Rex *verſ.* Robert Parnell.

Saturday 23d *June* 1759.

THE Defendant ſtood convicted of a very groſs, malicious, corrupt and wilful PERJURY, in certain Articles of the Peace exhibited by him, upon Oath, againſt Sir *Thomas Allen* and his Servants; for which Perjury he had, ſome time ago, been committed in Court, upon his voluntarily appearing there, to complain of Difficulties which he pretended to meet with, in obtaining Proceſs upon his Articles: Which *Articles* were *very expreſs and poſitive*; and, by the Courſe of the Court, muſt have been looked upon by the Court, to be *true*; according to the declared Opinion of the Court in † Lord and Lady *Vane*'s Caſe.

† *Rex* v. *Ld. Viſcount Vane*, *Hil.* 17 *G.* 2. 1743. *B. R.*

But, upon this Man's ſubſequent Application as above, and upon reading the Affidavits offered by Sir *Thomas* and his Servants and Others, in Anſwer to that Complaint, it appeared manifeſtly to the Court to be a *malicious* voluntary and groſs Perjury.

Whereupon, the Court not only rejected his Complaint, and *ſtayed Proceſs* againſt the Defendants, but alſo *committed* the Complainant for *Perjury*; taking a Recognizance from the Defendant's Clerk in Court "to proſecute him for "the Perjury."

Which Perjury being afterwards fully proved upon Him at the Trial, the Sentence now pronounced upon him was—

To be ſet in and upon the *Pillory* at Charing-Croſs (on 16th *July* next,) for One Hour; and to be TRANSPORTED for *Seven* Years.

Note—He appeared, throughout the whole of this Tranſaction, to be a very malicious dangerous Fellow.

Aſtley

* Aſtley Bart. *verſ.* Younge Eſq.

Tr. 32, 33 *G.* 2. *Rot'lo* 25.

* P. 807. *Tueſday* 26th *June* 1759.

THIS was an Action upon the Caſe, for ſpeaking and publiſhing defamatory, falſe, malicious and libellous Words, of and concerning the Plaintiff Sir *John Aſtley*.

The Plaintiff, after premiſing (as uſual) the Innocence and Integrity of his Character, good Manners, *&c*, ſets out in his Declaration, That the Defendant being One of the Juſtices of Peace for the County of *Wilts*, and having refuſed to grant a Licence to one *Henry Day* for the keeping of a public Inn and Ale-houſe in *Everly* in the County of *Wilts* aforeſaid; * Application was made to this Court concerning the ſaid Refuſal: And on that Application, Sir *John Aſtley*, the Plaintiff, made an Affidavit in Writing and upon Oath, which was produced and read before the ſaid Court, of certain Matters and Things relating to the ſaid Refuſal; and alledges that He had ſworn the ſame with great Truth and Veracity. That the Defendant, maliciouſly intending to ſcandalize Sir *John &c*, on the 1ſt of *September* 1757, at the City of *London*, in a certain Diſcourſe with diverſe Subjects of this Realm concerning the ſaid Sir *John* and his Affidavit aforeſaid, falſely and maliciouſly SPOKE *and* PUBLISHED to thoſe Subjects the following falſe defamatory and malicious Words, *viz.* "Sir *John Aſtley*, in "his Affidavit, hath SWORN FALSELY; and I have prov-"ed to the Court the contrary of what Sir *John* hath ſworn. "Sir *John* hath a great Eſtate: but I would not, for his "whole Eſtate, have ſworn as he did." And in another Diſcourſe on the ſame Day *&c* with diverſe other Subjects, the Defendant maliciouſly intending as aforeſaid, maliciouſly and falſely *&c* publiſhed the following Words, *viz.* "Sir *John is* FORSWORN;" (meaning that the ſaid Sir *John Aſtley* had been guilty of Perjury.) † Whereas in Truth and in Fact, he the ſaid Sir *John* had not in his ſaid Affidavit nor in any Part thereof ſworn falſely, nor ever was guilty of any Perjury whatſoever. By reaſon of which ſaid malicious falſe and ſcandalous *Words &c*, He the ſaid Sir *J. A.* hath been grievouſly injured *&c*.

* *V. ante*, *pa.* 556. 561.

† Here the Words are laid, in ſeveral different Manners, as to the *Phraſe* and *Expreſſion*, but without any material Difference of Import: As, "Sir *J. A.* hath ſworn "falſely; Sir *John* hath a great Eſtate, but, for his whole Eſtate, I would not have "ſworn as he hath done." Again, "Sir *J. A.* in his Affidavit, hath ſworn falſely; "And I have proved to the Court the Contrary. Sir *John* hath a great Eſtate: "but for his whole Eſtate, I would not have ſworn as He did." Again, "Sir "*J. A.* hath ſworn falſely: And I have proved the Contrary." Laſtly, "Sir "*John Aſtley* is forſworn."

Then

* P. 808. * Then the Declaration proceeds, to this Effect, *viz.*

And whereas, whilſt the aforeſaid Application to the Court of our ſaid Lord the King before the King Himſelf, concerning the ſaid Refuſal of the ſaid *Edward Younge* to grant a Licence, was depending in the ſaid Court, and before the Publication of the Libel hereinafter mentioned, to wit &c, the ſaid Sir *John* had made and exhibited his Affidavit as aforeſaid, and been ſworn to it &c; Nevertheleſs the Defendant, well knowing the Premiſſes, but again contriving and maliciouſly intending to vilify and aſperſe the Reputation and Character of the ſaid Sir *John* and to bring him into very great Infamy and Diſgrace, afterwards *viz.* on 24th *January* 1758, did wickedly and maliciouſly *make exhibit and publiſh to the ſame Court* of our Lord the King before the King Himſelf, a certain *malicious falſe and ſcandalous* LIBEL, contained in *a certain* AFFIDAVIT *in Writing* of Him the ſaid *Edward*, concerning (amongſt other Things) the ſaid Sir *John Aſtley* and his Affidavit aforeſaid; *In which Affidavit of the ſaid Edward Younge* there were and are contained (amongſt other Things) certain *falſe malicious* and *ſcandalous* Matters concerning the ſaid Sir *John* and his aforeſaid Affidavit, according to the Tenor following, *viz.* "And more-"over he" (meaning the ſaid *Edward Younge*) "ſhould "have thought himſelf deſerving of all which Sir *John* "*Aſtley* hath SO FALSELY SWORN againſt him, if the "Fear of any Power upon Earth could have moved him "to act judicially againſt his Judgment;" as by the ſaid Affidavit of the ſaid *Edward*, remaining affiled of Record in the ſaid Court &c, more fully appears. Whereas in Truth and in Fact, He the ſaid Sir *John Aſtley* did not in or by his ſaid Affidavit ſwear any Thing falſely againſt the ſaid *Edward*, nor ever was guilty of any Perjury or falſe Swearing whatſoever. By reaſon of which making exhibiting and publiſhing of the ſaid malicious falſe and ſcandalous *Libel* ſo publiſhed by the ſaid *Edward Younge* as aforeſaid, the ſaid Sir *John* is very much injured in his Character &c; To the Damage of the ſaid Sir *John* of 5000*l.* And thereupon he brings his Suit &c.

Plea. The Defendant (having obtained Leave to plead double,) firſt pleads "Not Guilty," to the whole Declaration: And iſſue is joined thereupon.

Then for further Plea to the Second Count, The Defendant, ſetting forth the Complaint made againſt Him, as above, juſtifies That He made ſuch AFFIDAVIT as in the ſaid 2d Count is mentioned, in his OWN DEFENCE againſt the ſaid Complaint made to this Court againſt Him for his Refuſal to grant ſuch Licence, and in Anſwer thereto and to the ſaid Affidavit of the ſaid Sir *John* ſo made to ſupport corroborate and ſtrengthen the ſame Complaint as aforeſaid.

* The Plaintiff demurred generally to the Defendant's Plea * P. 809.
to the laſt Count: And the Defendant joined in Demurrer.

Mr. Serj. *Davy* argued this Demurrer for the Plaintiff—The Plea, He ſaid, was inſufficient. For it admits the Charge of making the Affidavit *maliciouſly* and with *Intent to aſperſe* the Character of Sir *John Aſtley*: And the Defendant juſtifies it, not as being *true*, but only as being made *in Anſwer* to a Complaint ſupported by Sir *John*'s Affidavit; But does not alledge it to be a NECESSARY *Part* of his Defence. And every Thing muſt be taken moſt ſtrongly *againſt* the Party pleading. Therefore it muſt here be taken that it was "NOT *a neceſſary* Part of his Defence."

And this is a *Libel*, undoubtedly.

Lord MANSFIELD—Shew that a Matter given IN EVIDENCE *in a* COURT OF JUSTICE, may be proſecuted in a *Civil* Action, as a LIBEL. The Court, indeed, *before which* ſuch Evidence is given, may *cenſure* it.

Serj. *Davy*—I will prove it; (1ſt) from *Authorities*; (2dly) from the *Reaſon* of the Thing.

Firſt—He cited, as Authorities, that (as He ſaid) would † *prove* it, 4 *Co.* 14. *b. pl.* 3. *Buckley* v. *Wood*; and 1 *Hawk. P. C.* 194, 195. (where *Hawkins* offers his own private Opinion, and a very juſt and reaſonable One.) † *Sed V. Poſt.* 810.

Secondly—It would be moſt highly *inconvenient*, if it was otherwiſe. For any Man's *Character* might be cruelly injured by ſuch an Artifice as this: And if he could not be protected by *legal* Methods, He might (as in a State of Nature) be driven to *revenge* HIMSELF. It is very ſeldom that the Court before whom ſuch an Affidavit is wantonly and maliciouſly exhibited, interfere by *their* Cenſure.

This is an abſolute direct and unprovoked *Charge of* PERJURY: 'Tis a LIBEL, in the *Form* of an Affidavit. *Recrimination* does not at all ſerve to ſhew Innocence. This was not done to *defend* himſelf, but to ASPERSE *Sir John*.

And the Plea is *no Anſwer* to the Matter Charged in the Declaration. He is charged with *meaning* and *intending* to accuſe Sir *John* of Perjury: And he does *not deny* it. This is a Matter of *Fact*; which He *ought* to have anſwered.

* P. 810. * The Plea admits "that this *was a* LIBEL:" And the *Truth* of a Libel can *not* be *juſtified*.

Mr. *Winn*, *contra*, was beginning to argue the Caſe, on Behalf of the Defendant.

But Lord MANSFIELD told Him, it was unneceſſary for him to ſpeak to it; as the Matter was ſo plain.

Here was a *Charge againſt the Defendant* in a *Court of Juſtice*, made *upon Oath*, and ſupported by an Affidavit of Sir *J. A*: And in the Affidavit of the Defendant *in Anſwer* to this Complaint, He mentions the Charge upon him, and denies it, with this Concluſion of calling it "what Sir *John* "*Aſtley* has *ſo* FALSELY *ſworn* againſt Him."

Now in *every* Diſpute in a Court of Juſtice, *upon Oath*, where *One by Affidavit charges* a Thing, and the *Other by Affidavit denies* it; the Caſe is ordinarily *much the ſame* (in Effect) with the preſent; And Each Party might bring a Civil Action againſt the Other: For it too often happens, that the Affidavits and Evidence *are*, in Terms, DIRECTLY OPPOSITE to Each Other.

As to the *Authorities* cited, the former is not applicable to this Caſe; And the latter even leſſens the Authority of the former: And though there may be a good deal of Senſe perhaps, in the Opinion of *Hawkins*, Yet neither of theſe two Authorities relate to *giving Evidence*, nor to a Court that *has* Juriſdiction.

And as to the *Reaſon of the Thing*—There can be no SCANDAL, if the Allegation is *material*: And if it is not, the Court *before whom* the Indignity is committed by *immaterial* Scandal, may *order Satisfaction*, and *expunge* it out of the Record, if it be upon Record.

This that is now under our Conſideration, aroſe upon the very *Point in Queſtion*: It is *not* a *collateral* Recrimination. And Nothing is more common than to uſe the Word "UNTRULY" upon theſe Occaſions; *viz.* "As the adverſe "Party has *untruly* ſworn:" Which is much the ſame Thing as the Expreſſion here uſed, "Which Sir *J. A.* hath "ſo *falſely* ſworn againſt Him."

In the Caſe of *Lake* v. *King*, 1 *Saund.* 131. The Matter charged as the Foundation of that Action, (which was an Action upon the Caſe for printing and publiſhing a ſcandalous Libel upon the Plaintiff,) was contained in a Petition to a Committee of Parliament for Grievances, exhibited in a Court of Juſtice. It was agreed "That no Action lay for "*exhibiting*

" *exhibiting* the Petition, (which was lawful,) *although* the * P. 811.
" Matter contained in it was *falſe and ſcandalous*; BE-
" CAUSE it was in a ſummary *Court of Juſtice*, and before
" Thoſe who had Power to examine Whether it was true
" or falſe:" And Judgment was given for the Defendant, upon this Point, " That it was the *Order and Courſe of Pro-*
" *ceeding* in Parliament, to *print and deliver Copies &c*; Of
" which the Court ought to take judicial Notice."

There is another Caſe, which is vaſtly ſtronger; *viz.* 1 *Ro. Abr.* 87. Title " *Action ſur Caſe*," Letter *M. Pl.* 4. In an Action upon the Caſe by *A.* againſt *B.* the Plaintiff declares, that he took his Oath in this Court of *B. R.* againſt *B.* of certain Matters, to bind him *(B)*. to his good Behaviour: And thereupon *B.* then ſaid, falſely and maliciouſly, intending to ſcandalize the Plaintiff, in the Hearing of the Juſtices and Officers of the Court, and Others there being, " THERE IS NOT A WORD TRUE IN THAT AFFI-
" DAVIT; *And I will prove it by* 40 *Witneſſes.*" It was holden " That the Action was NOT *maintainable*: For the
" Anſwer which *B.* made to the ſaid Affidavit was a *Juſti-*
" *fication in Law*, and ſpoken *only* IN DEFENCE *of Him-*
" *ſelf*; and that *in a* LEGAL *and* JUDICIAL *Way*. (in as
" much as he ſaid He would *prove* it by 40 Witneſſes.")

As to the *Words*, that Caſe is quite parallel to the preſent: And they were only ſpoken *in his own Defence*, and by Way of *Juſtification in Law*, and *in a legal and judicial Way*, in Anſwer to a Complaint made againſt him to the Court. So here the Defendant's Affidavit is in Defence to a Complaint againſt Him; which Complaint was ſupported by the Affidavit of the preſent Plaintiff Sir *John Aſtley*: In Anſwer to which Affidavit of Sir *John*'s, the Defendant made the Affidavit containing the Words upon which the preſent Action is grounded.

This ought not to be made a Matter of Queſtion: And We are all of Us clear in the ſame Opinion.

And if the Matter of *Fact* be juſtified, the *Epithets* that the Plaintiff has thrown into this Declaration fall to the Ground.

As to the Words *ſpoken* by the Defendant OUT *of Court*— There is a Plea of Not Guilty to that Count. So that *that Point* is not now before Us.

This Expreſſion was taken Notice of by the Court, at the *Time* when the Affidavit was read; and *diſapproved* of indeed as to the Word " falſely;" which was thought too *rough* and *courſe* an Expreſſion, but yet was not judged to require a formal CENSURE from the Court.

* P. 812. * Mr. Juſt. DENISON concurred with his Lordſhip; and thought the Matter to be extremely plain.

As to the Epithets and Innuendoes thrown into the Declaration, They are *immaterial*; ſince the *Subſtantial Fact* itſelf is *juſtified*: For if the *Matter* is not actionable, the Manner is of no Conſequence.

Mr. Juſt. FOSTER concurred.

Mr. Juſt. WILMOT alſo concurred; and added, That the Caſe in * 1 *Ro. Abr.* 87. *Pl.* 4. is in ‡ Sir *William Jones* 431. and in † *March* 20. *Pl.* 45: And, in Sir *William Jones* the very Word "*falſe*" is made Uſe of; *Le Defendant malitioſè dit*, "que ceo fuit FALSE *Affidavit*; et que 40 "voilent jure al contrarie."

* There called *Moulton* and *Clapham*.
‡ There called *Boulton* v. *Clapham*.
† There called *Molton* v. *Clapham*.

Per Cur. unanimouſly and clearly,
JUDGMENT for the DEFENDANT.

Friday 29th *June* 1759.

Maud *verſ.* Barnard.

THE Queſtion, upon the *Regularity of* SERVING A WRIT, was "Whether a Writ returnable on ſuch "a Day, can be ſerved AFTER *the Court is riſen* upon "that Day."

This Service was at *Rocheſter*, in *Kent*; about 8 o'Clock in the Evening.

To prove it *irregular*, were cited *Cro. Eliz.* 761. *Wolley* v. *Moſely*, *(ſub finem:)* "A Writ may be executed on the *Day* "of the Return, becauſe the Sheriff *may* have it in Court, "to return." 2 *Salk.* 626. *Harvey* v. *Broad*—"A Writ "may be executed *the* DAY it is returnable; but *not after*." 6 *Mod.* 130. *Parkins* v. *Woollaſton*: "The Execution of a "*Capias* on the *Day* of the Return, SEDENTE CURIA, is "good: *Secùs*, NOT."

But *Per Cur*'—It muſt, at leaſt, be *proved* by the Perſon who objects to the Service, "That the Court WAS up:" For, otherwiſe, We will *intend* it to be regular.

Lord MANSFIELD—And in the Reaſon of the Thing, it is as impoſſible for the Sheriff to bring the Defendant *into Court before its Riſing*, as before the End of the *Day* of its Riſing, in all Caſes where the Diſtance is too great to bring him up *within* EITHER Time: As in the preſent Caſe, from *Rocheſter*, after 7 or 8 in the Evening; which was the Time when the Proceſs was ſerved.

But,

* But, however, there was a Caſe in Point in this Court, in the 11 *G.* 2. * *Powell* v. *Pugh*, or *Pugh* v. *Powell*; Where Proceſs was holden to be well ſerved on the Day of the Return, after *the Riſing* of the Court.

* P. 813.
* It was *Moſs* v. *Powell*, *Tr.* 11, 12 *G.* 2. See the Note below.

Note—There have been more Determinations, of the *ſame* kind: *viz.* In the Caſe of *Weyburn* v. *Neale*, *M.* 19 *G.* 2. 1745. *B. R.* Mr. *Miller* moved to ſtay Proceedings; For that the Defendant was ſerved with the Writ, on the Day of the Return, at *Eleven* at Night. And it was ſworn "that the Court was *not ſitting* upon "that Day at *Five* in the Afternoon." (In fact, it roſe at *two*, that Day.) And upon ſhewing Cauſe, The Rule "to ſhew Cauſe why the Proceedings ſhould not "be ſet aſide" was diſcharged.

In the Caſe of *Hall* v. *Gatton*, *H.* 2 *G.* 2. *B. R.* The Defendant was ſerved on the 27th of *November* at *Seven* in the Evening: And the Court roſe that Day at *Three*. It was denied "to ſtay Proceedings."

In the Caſe of *Moſs* v. *Powell* *Tr.* 11, 12 *G.* 2 *B. R.* The Defendant was ſerved with a Copy of the Proceſs, between 7 *and* 8 in the Evening of the Day when the Writ was returnable; *after* the Court was up. The Court held the Writ to be *well ſerved*; and that the Plaintiff had the *whole* Day: And they would *not* take Notice at *what Hour* the Court roſe.

Per Cur'—The Rule "to ſhew Cauſe why the Pro-"ceedings in the preſent Caſe ſhould not be ſet aſide," was DISCHARGED.

[So that the Point is now ſettled.]

Symes *verſ.* Symes.

A Motion for a Prohibition to the Eccleſiaſtical Court was denied by the Whole Court; For that where the Eccleſiaſtical Court *have Juriſdiction* (as in the preſent Caſe they had,) And they have pronounced Sentence, the Remedy muſt be *by Appeal*, and *not* by Way of Prohibition: But if they proceed where they have *no Juriſdiction* at all; there a Prohibition may be applied for, *after* Sentence in the Eccleſiaſtical Court.

They were clear that the preſent Caſe *was within the Juriſdiction* of the Eccleſiaſtical Court: And they had already *given Sentence* of Excommunication.

There-

* P. 814. * Therefore They refuſed even to make a Rule to ſhew Cauſe: though it was much preſſed by Mr. *Popham.*

Coppendale *verſ.* Bridgen and Another.

Saturday 30th June 1759.

THIS was an Action on the Caſe, againſt the Defendants as Sheriff of *Middleſex*, for a falſe return, in returning "*Nulla Bona*" to a *Fieri facias* directing them to levy 2050*l.* Debt, and 6*l.* 10*s.* Damages, on the Goods of *John Debonaire*, recovered againſt him by the Plaintiff, in the Court of Common Pleas.

A Special Caſe was ſettled and agreed upon at the Trial, (after the General Iſſue pleaded;) And a Verdict was taken for the Plaintiff, for 292*l.* 7*s.* Damages, ſubject to the Opinion of the Court upon the ſaid Caſe: which is as follows—

It was proved at the Trial, that the Plaintiff ſued out a Bill of *Middleſex* againſt *Debonaire*, on the 2d *of May* 1757, returnable on *Wedneſday* next after 3 Weeks from the Day of *Eaſter*. That a Precept was made out thereupon; and the party *arreſted the ſame Day*. That being ſo under Arreſt, on the 4th of the ſame *May*, He was *charged* with Proceſs out of the Court of Common Pleas, at the *Suit of One Joſeph Solomons:* And was, the ſame Day, brought by *Habeas Corpus*, to Mr. Juſt. *Clive*'s Chambers in *Serjeants Inn*; and committed to the *Fleet*, *charged* with *both* Actions.

That the Plaintiff in *Trinity* Term 30, 31 G. 2. according to the Courſe of the Court, obtained a Judgment againſt him in the Court of Common Pleas, for 2000*l.* Debt, and 6*l.* 10*s.* Damages.

That on 17th *June*, a *Fieri Facias* thereupon iſſued, at the Plaintiff's Suit, to the Sheriff of *Middleſex*, RETURNABLE *from the Day of the Holy Trinity in* 3 *Weeks*, (which was the 26*th Day of June:*) And that on the 18th of the ſame Month, the Defendants, being Sheriff, *took divers Goods* of the ſaid *Debonaire*, in Execution, and levied thereout the clear Sum of 292*l.* 7*s.* And that on the 5th *Day of November* the Defendants *returned* "NULLA BONA."

It was alſo ſtated, That the ſaid *Debonaire* was a *Trader* within the Intent of the ſeveral Statutes concerning Bankrupts; And that he *remained in Cuſtody*, at the *Plaintiff*'s Suit from the Time of the FIRST *Arreſt*, (which was on the ſaid 2d of *May* 1757, as aforeſaid,) UNTIL *and* UPON *the 2d of July* following: On *which* Day, he was diſcharged out of Cuſtody, *as to the Plaintiff's Suit*, but *continued in Cuſtody*, as to the ſaid *Solomons's Suit, until the* 6*th* Day of

* of the ſame *July*. And that a *Commiſſion of Bankruptcy*, on the 5th Day of the ſaid *July*, was iſſued againſt the ſaid *Debonaire*; and he was duly declared a Bankrupt, on the ſame Day: And on the *21ſt Day* of the ſame Month, his Effects were in due Manner *aſſigned*. * P 815.

And the Queſtion ſubmitted to the Court is, "Whether "upon the Whole of this Caſe, the Plaintiff is intitled to "recover againſt the Defendants in this Action."

Mr. *Aſhurſt* for the Plaintiff.

The Queſtion is Whether *Debonaire*'s Lying in *Priſon* 2 *Months* will have ſo far RELATION to the Time of the *firſt Arreſt*, as to affect his Goods which were taken in Execution upon a Proceſs *returnable before* the two Months were expired; but not *actually returned* till *after* he had lain in Priſon 2 Months.

The Act of 21 *Jac.* 1. *c.* 19. §. 2. ought to be taken favourably for particular Creditors.

As to the Caſes of *Came* v. *Coleman*, *Tr.* 2 *W.* & *M. in Cam' Scac'*, 1 *Salk.* 109. and *Duncombe* v. *Walter*, *Hil.* 32, 33 *C.* 2. in *C. B.* 3 *Lev.* 57. and *Hill et al.* v. *Shiſh*, *Paſch.* 3 *Jac.* 2. in 2 *Shower* 512. and *Smith* v. *Stracy*, *Tr.* 2 *Ann. coram Holt* at *Niſi prius*, in 1 *Salk.* 110, 111.—There was a later Caſe than any of * theſe, in *P.* 17 *G.* 2. *C. B.* of † *Tribe* v *Webber*; which *denied* that of *Smith* v. *Stracy*, and is full in Point *againſt* it. * *V. ante*, *pa.* 438. *Roſe* v. *Green*; where 4 of theſe Caſes are cited and diſcuſſed. † *Davis's Laws relating to Bankrupts*, *pa.* 376. gives a full Report of the Caſe of *Tribe* v. *Webber*: And the different Reports of the Caſe of *Duncomb* v. *Walter* are there compared and adjuſted.

And He cited *Skinner* 270. *Hinton*'s Caſe, and 1 *Ld. Raym.* 724. *Cole* v. *Davies et al'*, Aſſignees of *Maul*, a Bankrupt; and argued from them, "that the Execution is "*Good*, to all Intents and Purpoſes:" And even the *Plaintiff himſelf*, he ſaid, would not have been obliged to *refund* the Money, if it had been paid to Him upon a Return "that it was levied."

But the *Sheriff* is undoubtedly *liable* to the Plaintiff's Demand; becauſe the Truth of the Return muſt be taken to be what was true *at the Return*-Day of the Writ; and it muſt be conſidered as if it had been actually returned UPON the Day whereon it was *made returnable*.

The Caſe of ‡ *Cowper et al'* v. *Chitty et al'*, *B. R. M.* 1756. 30 *G.* 2. proves that no Wrong would have been done by the Sheriff, nor could he have been hurt, by returning ‡ *V. ante*, *pa.* 20.

* P. 816. * turning "That he had levied the Money and had it ready:" For at the *Return-Day*, the Man was *not* a Bankrupt.

And no *ſubſequent* Relation can exculpate the Sheriff for returning "Nulla bona."

Mr. *Yates*, for the Defendants.

The Queſtion turns upon two Conſiderations;

1ſt. Whether the preſent Return ſhall be taken as a Return made UPON *the Return-Day:* And if ſo, then Whether it was a good Return, as ſuppoſed to be made *upon* the Return-Day.

2d. Whether it is to be taken as a Return made upon the ſubſequent Day, when it was *actually* made.

Firſt—The *Relation* is to the Time of the *firſt* Arreſt. Conſequently, the Goods were not the Bankrupt's Goods, even at the Time when the Writ was *returnable*; but were then, by ſuch Relation, the Property of the *Aſſignees:* The Defendant *Debonaire* Himſelf had then (by reaſon of ſuch Relation,) no Intereſt in them; Nor conſequently, could the Plaintiff have any Right to them *veſted* in him by the Seizure of them.

If a Judgment is reverſed, a Plea of "*Nul tiel Record*" is good.

And as to the *Plaintiff's Refunding* the Money, if he had received it upon a Return of its being levied; He anſwered, that if the Plaintiff had actually received the Money of the Sheriff, He *muſt* have refunded it: And He cited 2 *Strange* 996. *Ruſh et al' v. Baker*, as a Proof of his Aſſertion.

But Secondly—The Sheriff was *not called upon* to make a Return, TILL *the 5th of November*; which was long after the Bankruptcy and the Aſſignment.

And no *Fiction of Law* ſhall make an Officer *guilty of a falſe Return*. But here, the Suppoſing the Writ to have been actually returned AT and *upon* the Day, is a *mere Fiction*, and contrary to the Fact ſtated.

The Sheriff had no Right to take the Goods of the Aſſignees: And Trover would lie againſt him for it, if he ſhould do ſo; * *Cooper* v. *Chitty M.* 1756. 30 *G.* 2. *B. R.* was ſo determined: And the Sheriff ought not to be liable to an Action both Ways.

* *V. ante, pa.* 20.

Mr.

* Mr. *Aſhurſt*, in Reply— * P. 817.

This is a *complex* Act of Bankruptcy: Therefore it differs from a Bankruptcy ariſing upon a *ſingle* Act. Here, the Man is not a Bankrupt, *till* he has lain 2 Months in Priſon.

The Right of Seizure of the Goods was VESTED in the Plaintiff UPON the Day of the Return: And therefore could *not* be deveſted by a *ſubſequent* Aſſignment of them. And *upon* the Day when the Writ was returnable, no Body could *then* ſay "That the Defendant WOULD *lie* in Gaol "2 Months, and by ſo doing become a Bankrupt."

This is not like the Reverſal of a Judgment. For, here, the *Right* to *ſeize* the Goods was actually *veſted* in the Plaintiff: Therefore the Sheriff is guilty of a falſe Return, in returning "*Nulla bona*." It was the *Duty* of the Sheriff, to make his Return ON the *Day* when the Writ was *returnable:* And he ſhall *not profit* by the *not* returning it in Time.

As to 2 *Strange* 996. *Ruſh et al'*, *Aſſignees of Ryland*, v. *Baker:* Though the Action might lie in *that* Caſe, againſt the Defendant *Baker*, Yet this Plaintiff would *not*, in the *preſent* Caſe, have been liable to refund the Money, if he had received it upon a Return "that it had been levied." But if he would, the *Sheriff* can *not avail* himſelf of that.

Lord MANSFIELD—This Bankrupt was *firſt* arreſted at the Suit of the Man who is the preſent Plaintiff againſt the Sheriff: he was *afterwards* charged in Cuſtody, at the Suit of *Solomons*.

The 1ſt Queſtion is—Whether the Return be *falſe*; *i.e.* Whether theſe were the Goods *of* the *Bankrupt*, or not. And that depends upon the Bankruptcy of the Defendant in the Original Action.

If this Man, *Debonaire*, was a Bankrupt on the 2*d* of *May*, when he was firſt arreſted at the Plaintiff's Suit; or even upon the 4*th* of *May*, when he was charged in Cuſtody at the Suit of *Solomons*; The Goods could not belong to *Him*, but muſt have belonged to the *Aſſignees*, by *Relation* backwards to that Time.

Now the Words of the * Act are as plain as poſſible: They are "That all and every Perſon &c, who ſhall &c; "Or, *being arreſted for Debt*, ſhall after his or her Arreſt, "*lie in Priſon* 2 *Months* or more, upon *that* OR ANY "OTHER *Arreſt or Detention in Priſon for Debt*; ſhall be "accounted

* 21 *Jac.* 1. c. 19 § 2.

* P. 818. " * accounted and adjudged a *Bankrupt to all Intents and Pur-*
" *poſes,* FROM THE TIME *of his or her ſaid* FIRST *Arreſt.*"

This Man was *arreſted on the* 2*d* of *May:* and on the 4*th of May*, was *charged in Cuſtody, with that and another Action:* And it is admitted, " that he *did lie* 2 *Months in* " *Priſon;*" *viz.* till the 6th of *July*, at *Solomons*'s Suit; and till the 2d of *July*, before he was diſcharged as to the Plaintiff's Suit.

The Lying two Months in Priſon is a ſtrong Preſumption that the Perſon was *inſolvent at the Time* of the Arreſt. And the Act ſays that " if he lies in Priſon 2 Months upon *that*, " or ANY OTHER Arreſt, He ſhall be adjudged a Bank-" rupt from the Time of the *firſt* Arreſt." So that here is plainly an Act of Bankruptcy on the 4*th* of *May*; whatever Diſpute may be made about there being One upon the 2d.

Conſequently, the Sheriff's Return is TRUE.

If the Sheriff had returned, " that he had levied *&c.*;" and had actually paid the Money to the Plaintiff, *on the* 26*th of June*, (which was WITHIN the two Months,) the *Sheriff* would have been excuſed; becauſe it was impoſſible for Him, at *that* Time, to know that the Defendant WOULD lie 2 Months in Priſon; And therefore He was under an *invincible Ignorance* of this Event. But the PLAINTIFF, could have had no Advantage by this: For ſtill *He* would have been liable to REFUND the Money; although the *Sheriff* might be excuſable in Paying it to him.

But at the Time when this Return was *in Fact* made, it was *then* certainly true, and known to the Plaintiff to be true, " That the Man was become a Bankrupt:" and the Goods were *then* the Property of the *Aſſignees.*

* *V. ante, pa.* 31 to 38.

And in the Caſe of * *Cooper* v. *Chitty et al'*, It was determined " That in ſuch Caſe the Sheriff might and ought " to return *Nulla bona.*" Therefore this is a plain Caſe.

Nothing could ſupport the Plaintiff's Claim, but his ſhewing that the Bankruptcy was not incurred till after the 18*th of June*; which was the Time when the Goods were *taken in Execution.*

Mr. Juſt. DENISON concurred.

When the Sheriff *made* the Return, it was *then* certainly true, " That the Defendant was a Bankrupt, before " the Taking of the Goods." Indeed *if* He had returned the

* the Writ *upon the Day*, when it was made *returnable*, perhaps He might have been HIMSELF juſtified in returning "that he had levied and ſold the Goods," and even in paying the Money over to the Plaintiff: But yet the PLAINTIFF muſt have *refunded* it, even in *that* Caſe. * P. 819.

However, it is here ſtated, "that the Return was made "on the 5*th of November*:" Which was long after the Relation had taken Place.

Mr. Juſt. FOSTER—The *Relation*, in *this* Caſe, is in *Favour* of Equity and Juſtice; and is expreſsly directed by the Statute.

And this Return is TRUE: For the Man was a Bankrupt *at the Time* of the Sheriff's making it, by ſuch *Relation backward*, prior to the Taking of the Goods. *If* He had made this Return *on the Day* of the Return of the Writ, I cannot ſay that even *that* would have been a *falſe* Return: Becauſe the *Relation* is made to be to the *Time of the firſt Arreſt*, by the expreſs Words of the Statute.

Mr. Juſt. WILMOT was of the ſame Opinion with the Reſt of the Court.

The Act is *poſitive*, in making the Bankruptcy to commence from the *Time of the firſt Arreſt*; wherever the Trader ſhall lie in Priſon 2 Months, upon that or any other Arreſt. And the Reaſon why it ſhould be ſo, is very obvious; *viz.* Becauſe it is a Preſumption of his *Inſolvency at the* TIME *of the Arreſt*: For a Man in Trade muſt be very low, both in Point of *Fortune* and *Credit* who lies 2 Months in Priſon, without being able either to pay his Debt or to procure Bail.

As to a Return of this Sort made *on the 26th of June*, which was the *very Day* upon which the Writ was made *returnable*; I have ſome doubt about, if that had been the Caſe. I am not ſo clear that He could *then* have returned "*Nulla bona*:" Becauſe at *that* Time, there was *no* Act of Bankruptcy; And it was impoſſible for the Sheriff to *know*, that there WOULD BE One in future, by the Man's lying 2 Months in Priſon, and thereby becoming a Bankrupt *relatively* to the Time of the firſt Arreſt.

But there can be no Sort of Doubt but that at the *Time* when the Return was *actually made*, it was *true* "that the "Defendant was become a Bankrupt, by having lain 2 "Months in Priſon:" And conſequently, the Goods were *then* the Property of the *Aſſignees*, by *Relation* to the Time of the firſt Arreſt.

It

* P. 820. * It appears to Us, upon the State of the Caſe, That the Return was *not actually* made, TILL *the 5th of November*. And indeed if the Sheriff had, at the very Day of the Return of the Writ, returned " that he had levied the " Money," and had thereupon immediately *paid it over* to the Plaintiff; there could be no Sort of Doubt but that the Aſſignees might nevertheleſs have *recovered* it back from the PLAINTIFF. So that the PLAINTIFF could not, even in *that* Caſe, have profited by ſuch Return.

Per Cur. Let the *Poſtea* be delivered to the DEFENDANTS; in Order to have a Judgment of NONSUIT entered thereon.

Monday 2d *July* 1759.

Collins ſen. *verſ.* Collins jun.

Paſ. 32 *G.* 2. *Rot'lo* 405.

THIS was an Action of Debt upon Bond.

The Condition appeared, upon *Oyer*, to be " to pay the " Plaintiff an Annuity of 10 *l.* a Year during his Life; and " likewiſe to *maintain* him in Meat Drink Waſhing and " Lodging, IN THE DWELLING-HOUSE at CRUNDALL END, for and during his *Life*."

To this Declaration, the Defendant pleaded (by Leave) ſeveral Pleas.

As to the Payment of the Annuity of 10 *l. per Annum*— There was a Plea of a *Set-off*; (*viz.* that only 60*l.* is due to the Plaintiff on Account of the ſaid Annuity; And that the Plaintiff owes him more than 60*l.* *viz.* 500*l.*)

As to the *maintaining* the Plaintiff &c,—There was a Plea * That the PLAINTIFF LEFT THE HOUSE VOLUNTARILY, and did not board and lodge *in* the Houſe: So that He (the Defendant) was *not obliged* to board waſh and lodge him. But the Defendant avers that he was always ready to maintain him &c, AT *and* IN *the Houſe*. [*V. infra.*]

* See this Plea more at large, *Poſt.* 821.

The Plaintiff demurs: And the Defendant joins in Demurrer.

The latter Plea depended upon the Words of the Condition: which was,—" That if *Joſeph Collins* the Younger, " his Heirs Executors or Adminiſtrators, do and ſhall well " and truly pay or cauſe to be paid unto *Joſeph Collins* the " Elder and his Aſſigns, Yearly and every Year during his " Life, One ANNUITY of 10 *l.* of lawful Money of " *Great Britain*, clear of All Taxes &c, on the 25th of " *March*

" * *March* and 29th of *September* Yearly; And if the ſaid * P. 821.
" *Joſeph Collins* the younger ſhall find provide and allow to
" and for the ſaid *Joſeph Collins* the Elder, good and ſuffi-
" cient Meat Drink Waſhing and Lodging IN *the Dwelling-*
" *Houſe at Crundall-End* aforeſaid; Then this Obligation
" to be void: But if Default ſhall be made in the Payment
" of the ſaid ANNUITY of 10 *l.* or any Part thereof, at or
" upon any or either of the Days abovementioned for the
" Payment thereof; *Or if* he the ſaid *Joſeph Collins* the
" Younger ſhall *neglect or refuſe to* MAINTAIN AND
" KEEP the ſaid *Joſeph Collins* the Elder, during his natural
" Life AS AFORESAID; Then, and in *Either* of the ſaid
" Caſes, to be and remain in full Force and Virtue."

The Defendant (having Leave to plead ſeveral Pleas *&c*,) pleaded a SET-OFF, (as is beforementioned) to the former Part of the Condition, which was for Payment of the *Annuity*. And as to the latter, He pleaded that the *Houſe at Crundall-End* was the Houſe where the ſaid *Joſeph Collins the Younger dwelt*, and ever ſince has dwelt, with his Family; And that he did admit the ſaid *Joſeph Collins* the Elder, and receive him into the ſaid Houſe; and did, *until his Departure* aftermentioned, find provide and allow to the ſaid *Joſeph* the Elder Meat Drink *&c* [in the Words of the Condition:] But that he the ſaid *Joſeph* the Elder, *of his own Accord*, DEPARTED FROM THE SAID HOUSE at *Crundall-End*, and has *never yet returned*, to be THERE provided with Meat Drink *&c* (*ut ſupra*); Nor hath *ever required* to be provided with any, or to have any allowed, THERE. And the ſaid *Joſeph* the Younger has *always been ready* to have provided the ſaid *Joſeph* the Elder with Meat Drink *&c* (*ut ſupra*) AT *and* IN *the ſaid Dwelling-Houſe*, if He had *not departed*, or would have *returned* THITHER: But that He always has refuſed and ſtill does *refuſe to return*; but has continued *abſent from* THENCE. *Therefore* he could not provide him with Meat Drink *&c* (*ut ſupra*) AT *or* IN *the ſaid Dwelling-Houſe*.

To this Plea, the Plaintiff demurred: And the Defendant joined in Demurrer.

Mr. Serj. *Poole*, on Behalf of the Plaintiff, argued That this Caſe of an *Annuity* or *Yearly Payment* does not fall within the * Statute of 8 *G.* 2. *c.* 24. §. 5. concerning Set-offs; becauſe the Action is not brought for a Sum *complete* and *certain*, but for a Part of a growing Sum payable *for Life*; whereof *future* Payments will be continually becoming due. * *V. ante*, pa. 799. *Priſoner's* Caſe.

Now if the Judgment be here entered for the Remainder (as that Act directs,) it paſſes *in rem judicatam*; and the Plaintiff cannot recover any more, on any *future* Default of Payment upon the ſame Bond.

By

* P. 822. * By §. 4. of this Act, The Proviſion for ſetting mutual Debts one againſt the Other, was looked upon as highly juſt and reaſonable at *all* Times: It is therefore provided that the Clauſe in 2 *G.* 2. *c.* 22. " for ſetting mutual Debts One " againſt the Other" ſhall be and remain in full Force *for ever.*

Section 5. of this Act of 8 *G.* 2. *c.* 24. provides " That " by Virtue of the ſaid Clauſe in 2 *G.* 2. *c.* 22. (which is " thereby made perpetual,) Mutual Debts may be ſet againſt " each other, either by being pleaded in Bar, or given in Evi- " dence on the General Iſſue, in the Manner therein men- " tioned, *notwithſtanding* that ſuch Debts are deemed in " Law to be of a *different Nature*; Unleſs in Caſes where " either of the ſaid Debts ſhall accrue by reaſon of a Penalty " contained in any Bond or Specialty; and in all Caſes " where either the Debt for which the Action hath been or " ſhall be brought, or the Debt intended to be ſet againſt " the ſame hath accrued or ſhall accrue by reaſon of any " ſuch Penalty, the Debt intended to be ſet off ſhall be " pleaded in Bar, in which Plea ſhall be ſhewn how much " is truly and juſtly due on either Side: and in Caſe the " Plaintiff ſhall recover in any ſuch Action or Suit, *Judg-* " *ment* ſhall be entered for NO MORE than ſhall appear " to be *truly and juſtly due* to the Plaintiff, after one Debt " being ſet againſt the other as aforeſaid."

This is not a Bond conditioned for Performance of Covenants or Agreements contained in any Deed or Writing: It contains a quite different and diſtinct Condition. The preſent Action is an Action of Debt upon a Bond conditioned to *pay an Annuity* and *maintain a Parent.*

Mr. Serj. *Hewitt contra*—This is a new Caſe.

The Setting off of mutual Debts ariſes on 2 *G.* 2. *c.* 22. §. 13. (which was a temporary Act,) and on 8 *G.* 2. *c.* 24. §. 4, 5. (which makes the former perpetual.)

This laſt Section (§ 5.) provides, generally " That *where-* " *ever* the Debt ariſes upon a *Bond or Specialty with a Penalty*, " and accrues by reaſon of ſuch Penalty, a Set-off may be " pleaded." My Brother *Poole* ſays, " It extends *only* to " Caſes where the Debt is a *Sum certain.*" But the Words of the Act are *general*; and are not at all confined to Sums certain. And the Plaintiff *may* afterwards recover, for *ſub-* *ſequent* Defaults; notwithſtanding the prior Judgment: For the *Penalty* will *always* remain a Duty.

Our Plea covers the whole Demand.

Mr.

Mr. Serj. *Poole* was beginning to reply—But an † Obſervation having been made by Mr. Juſt. *Deniſon*, upon the latter Part of the Condition ;

Mr. Serj. *Hewitt* deſired it might ſtand over till next Paper-Day ; (intending to make a Motion, in the Interim, for Leave to amend.) To which Requeſt the Court agreed.

ULTERIUS CONCILIUM.

On the next Paper-Day, (26th *June*,) Mr. Serjeant *Poole* proceeded in his Reply ; (Serjeant *Hewitt not* having moved to amend.) He argued that a Set-off could not be pleaded, under *this* Act: For this Act is general, and has no ſuch Proviſion as there is in the Act of 8, 9 *W.* 3. *c.* 11. §. *ult. viz.* " That the Judgment ſhall *ſtand as a Security*." And therefore if the Plaintiff ſhould now recover Judgment, there would be an *End* of the Bond ; And there would remain *no* Security at all for *future* Payment of the Annuity.

And he agreed with Mr. Serjeant *Hewitt*, That this is a *new* Caſe.

Mr. Serjeant *Hewitt* inſiſted, that this Act of 8 *G.* 2. *c.* 24. differs materially from 8, 9 *W.* 3. and from 4, 5 *Ann. c.* 16. §. 13. for bringing in the Money, and having the Bond diſcharged. The preſent Act ſays " That the Plaintiff ſhall " recover the Sum truly and juſtly due, and *no more*." And my Brother *Poole* ſays, " That after the Matter is paſſed *in* " *rem judicatam*, the Plaintiff *cannot afterwards* recover any " more upon the ſame Bond." But I anſwer, that the Plaintiff *would be* at Liberty to bring an *Action for any future Breach :* For the preſent Judgment (upon the Set-off) would not be for the *Penalty*, but only for the *Sum truly and juſtly* due, and no more.

Lord MANSFIELD—Theſe Clauſes in 8, 9 *W.* 3. *c.* 11. and 8 *G.* 2. *c.* 24. are extremely *beneficial to the Subject*.

Therefore His Lordſhip choſe, He ſaid, to conſider of it ; and did not mean to give his Opinion at preſent. However, by way of breaking Caſe, He entered into an Explication of the Acts ; which He thought ought to be conſidered *All together*, as being made *in pari materia*. So that *Stoppage* or *Setting-off* muſt have the ſame Effect, under the 8 *G.* 2. as *Payment* had under 8, 9 *W.* 3.

Therefore He thought, (at preſent), that it was moſt beneficial to the Subject, that in the Caſe now before the Court, the Set-off *ſhould* be allowed. But he aſſured Serjeant *Poole*, that if they ſhould be of that Opinion on Deliberation, He ſhould not, as it was a new Caſe, be caught by his Demurrer : For that They would give him Leave to withdraw it, and reply.

CUR. ADVIS'.

Lord

* P. 823.

† "Whether the Son was not obliged to *maintain* his Father *generally*, *wherever* he ſhould be ; though he was obliged to *lodge* Him, only in that *ſpecific* Houſe."

* P. 824. * Lord MANSFIELD now delivered the Reſolution of the Court; *viz.* That they were All (upon deliberate Conſideration) unanimouſly and clearly of Opinion (as it ſtruck him before) That this is a Caſe WITHIN 8 *G.* 2. *c.* 24. §. 4, 5. Where mutual *Debts* may be ſet off, juſt as much as actual *Payment* of the Money might have been *before*.

He ſaid He would conſider how the Law ſtood, before the Acts of 2 *G.* 2 *c.* 22. and 8 *G.* 2. *c.* 24. and under the Act of 8, 9 *W.* 3. *c.* 11.

The Act of 8, 9 *W.* 3. *c.* 11. is intitled "An Act for the
* §. 8. "better preventing frivolous and vexatious Suits." The * laſt Clauſe of it is a Proviſion intended to meet the Caſe of Non-performance of Covenants and Agreements ſecured by Bonds or Indentures; and which Covenants or Agreements are to be performed at *different* Times, or the Monies paid by *Inſtallments &c.*

Before that Act, a Plaintiff could only aſſign *One* Breach, upon ſuch Bond or Indenture: And if the Defendant could prove that the *whole* Debt was *paid*, there was an End of the Matter. But if the Defendant had only paid *Part* of the Debt, and *not the Whole*, then the Judgment was taken for the *whole Penalty*: And this Judgment for the *whole Penalty* ſtood as a Security for the *Reſidue* of the Demand which remained unpaid. So that the Judgment ſtood for the *whole* Penalty, though only *Part* remained due; and the Plaintiff was juſtly intitled only to *that*, and *no more*: Which often forced the Defendant, in ſuch a Caſe, into expenſive Suits in Equity, for Relief.

‡ §. 8. To prevent which, the ‡ laſt Clauſe of this Act of 8, 9 *W.* 3. *c.* 11. provides "That in all Actions, in any of His "Majeſty's Courts of Record, upon any Bond or Bonds, or "on any penal Sum, for Non-performance of any Covenants "or Agreements in any Indenture Deed or Writing con"tained, the Plaintiff or Plaintiffs may aſſign as many "Breaches as he or they ſhall think fit; And the Jury ſhall "aſſeſs Damages and Coſts on ſo many of them as the Plain"tiff ſhall prove to have been broken: And the like Judg"ment ſhall be entered on ſuch Verdict, as had been uſually "done in ſuch like Actions." Then there is a ſuitable Proviſion for ſuggeſting ſeveral Breaches, where the Judgment paſſes by Default, Confeſſion or on Demurrer. Then the Act provides, "That if after Judgment and before Execu"tion executed, the Defendant ſhall *pay* into Court all the "Damages and Coſts on the ſeveral Breaches aſſigned and "found, a *Stay of Execution* on the Judgment ſhall be "entered upon Record: Or if, by Reaſon of any *Execution*

"*executed*

" *executed*, the Plaintiff ſhall be *fully paid and ſatisfied* all * P. 825.
" ſuch Damages and Coſts, and the Charges of ſuch Exe-
" cution; then the Body, Lands or Goods of the Defendant
" ſhall be diſcharged of ſuch Execution; which ſhall like-
" wiſe be entered upon Record. But yet, in each Caſe,
" the JUDGMENT ſhall *remain as a further Security*, to
" anſwer Damages to the Plaintiff for *future* Breaches:
" Upon which, the Plaintiff may have a *Scire facias* on the
" Judgment, ſuggeſting *other Breaches*; whereupon there
" ſhall be the like Proceeding as was in the Action of Debt
" upon the Bond, for aſſeſſing Damages on *ſuch* Breaches:
" And on Payment or Satisfaction, as before, of ſuch *future*
" Damages Coſts and Charges as aforeſaid, All further Pro-
" ceedings ſhall be AGAIN *ſtayed*; And ſo, *toties quoties*;
" and the Defendant his Body Lands or Goods ſhall be diſ-
" charged out of Execution, as aforeſaid."

A very beneficial Remedy, and a very juſt One to the ſubject, this is. The JUDGMENT is to be for the *whole Penalty*, and is to *remain* as a *further Security*; though EXECUTION is to be ſtayed on Payment of the Sum due *&c.*: So that the *Penalty* is a *Security* for the Debt Intereſt and Coſts, upon any *future* Breach.

Before this Statute, the ACTUAL PAYMENT of Money in Diſcharge of the Demand, was exactly upon the ſame foot, as the SET-OFF *of a Debt* is *now* put upon: And a *Plea of* PAYMENT of a Sum of Money ſufficient to diſcharge the *whole* Demand was juſt the ſame *then*, as a SET-OFF *of a Debt* large enough to balance the *whole* Demand, is *now*: That is to ſay, It was a *full Anſwer* to the Plaintiff's Demand; And he could have *no Judgment at all* againſt the Defendant.

But if it had come out, that there had been a Failure of *Payment* of *any Part* of the Plaintiff's juſt Demand, the Plaintiff would have been intitled to take his JUDGMENT for the *whole Penalty*; (Though EXECUTION was to be ſtayed on Payment of the *Damages already incurred*, and *Coſts*:) And this Judgment for the *whole* Penalty was to ſtand as a *Security*, to anſwer *future* Breaches.

But the Payment here intended was to be an ACTUAL Payment. For *Stoppage*, or *Setting off* Debt againſt Debt, was not *then* equivalent to actual Payment: But Croſs Actions muſt, at *that* Time have been brought, for the reſpective mutual Debts.

Since theſe two very beneficial Acts of 2 *G.* 2. *c.* 22. and 8 *G.* 2. *c.* 24. *Stoppage*, or *Setting-off* of mutual Debts, is *become equivalent to actual Payment*: And a *Balance ſhall be ſtruck*, as in Equity and Juſtice it ought to be.

* P. 826. * At *Common Law*, before theſe Acts, If the Plaintiff was as much, or even more indebted to the Defendant than the Defendant was indebted to Him, Yet the Defendant had no Method to ſtrike a Balance: He could only go into a Court of *Equity*, for doing what is moſt clearly *juſt* and *right* to be done.

The 2 *G.* 2. *c.* 22. was made to anſwer this juſt and reaſonable End; and enacts * generally, "That where there "are mutual Debts between the Parties, One Debt may be "ſet againſt the Other." Upon which Act of 2 *G.* 2. Doubts about the *different Natures* of Debts have ariſen, the 8 *G.* 2. *c.* 24. was thereupon made: The 5th Section whereof is a † *General* Proviſion † *without Exception*. So that the Objections which have been here made, on the Part of the Plaintiff, are made by *Conſtruction* only.

* *V.* §. 13.

† See it, at large, *ante pa.* 822.

Objection. It is objected, firſt, "That this is *not* an Action brought "upon a Penalty for Non-Performance of an Agreement or "Covenant *contained* in any *Indenture Deed* or *Writing*."

Anſwer. This is an *Agreement between* the Parties, and an Agreement *in Writing*: The *Condition of the Bond* is an *Agreement in Writing*; And People have frequently gone into Courts of Equity upon Conditions of Bonds, *as* being Agreements in Writing, to have a *ſpecfix Performance* of them.

Objection. It is ſaid that if the Plaintiff ſhould take his Judgment upon this Act of Parliament, it would *not* be a *Judgment* for the PENALTY, but a Judgment *only* for the *Sum due*, and NO MORE; and that after the Matter has once paſſed *in rem judicatam*, the Plaintiff *cannot afterwards recover any more* upon this Bond, whatever may become due by future Non-Payments; For that here is *no Proviſion* "that the "Judgment ſhall *ſtand as a Security for future Payments*," as there was in the Act of 8, 9 *W.* 3. *c* 11. made for the better preventing frivolous and vexatious Suits.

Anſwer. The Judgment is indeed by this Act of 8 *G.* 2. directed to be entered "for no more than ſhall appear to be juſtly and "truly due to the Plaintiff:" But it is clearly *within the Words and Meaning* of the Act, That the *Penalty* is to *remain* as a Security againſt future Breaches, in this Caſe of a *Set-off* pleaded, as much as it would have done upon the Act of 8, 9 *W.* 3. *c.* 11. if *Payment* had been made agreeably to the Directions therein contained.

But as this has not been before ſettled, "That a Set-off "may be pleaded in ſuch a Caſe as this, where the Condition "is for the Payment of an *Annuity* or *growing Sum*," It would be hard to bind the Plaintiff down ſtrictly to his Demurrer.

Therefore

* Therefore my Brother *Poole* may move to *withdraw the Demurrer*, and to reply in a proper Manner: Which will give the Plaintiff an Opportunity of diſputing the Debt pleaded by Way of Set-off, if he thinks proper. * P. 827.

Which Mr. Serj. *Poole* moved accordingly: And the Court granted it; but added that it ſhould be *upon Payment of Coſts*.

Wilſon *verſ.* Day.

THIS was an Action of Treſpaſs for breaking and entering the Plaintiff's Houſe, and taking away his Goods. "Not Guilty" was pleaded; And alſo (by Leave) a Juſtification under a Commiſſion of Bankruptcy, awarded againſt one *Lawſon*.

At the Trial, the Matter was referred to the Opinion of the Court.

N. B. John Day (the Defendant) was a Meſſenger under the ſaid Commiſſion of Bankruptcy; and in this his Juſtification, made Title to the Poſſeſſion of the Houſe under an Aſſignment from the Commiſſioners.

The General Queſtion reſerved for the Opinion of the Court was "Whether an Aſſignment made by *Lawſon* was, "in itſelf, an *Act of Bankruptcy*:" And it was directed to come on, by Way of Motion.

Lord MANSFIELD ſtated the material Facts of the Caſe to be to the following Effect.

One *Lawſon*, a Trader, who was concerned with one *Titley* in circulating Notes, and was really indebted to the Plaintiff *Wilſon*, being in a Fright on *Titley*'s Going off, ſent for *Wilſon* on the *Thurſday* (the 16th of *November*,) and told him "that *Titley* was gone off, and that many Notes were "ſtanding out againſt Him, and that he could not ſtand his "Ground;" and therefore propoſed to ſecure *Wilſon:* And on the *Saturday* following (the 18th of *November*) ſent for an Attorney and preſſed him to draw an Aſſignment immediately from Him the ſaid *Lawſon* to *Wilſon*. The Attorney could not do it till *Monday*; and it was privately executed on that Day, though it bore Date on the preceding *Saturday*. It was executed to *Wilſon*, *to ſecure Money* REALLY DUE *to him*, and which He was *liable to pay* on *Lawſon*'s Account; And it purports to be *only* a Security for ſuch Money, but does *not liquidate* the Sum due. A Day or two after, a Defeaſance was executed; which was a *Separate* Deed, making the former void upon Payment of all the Money due to

* P. 828. * *Wilſon:* But this Defeazance did not ſpecify how much it was, any more than the Aſſignment did. After Payment of *Wilſon*'s Debt; as to the Reſidue, it was to be in Truſt for *Lawſon* Himſelf. The Aſſignment was a general Aſſignment of EVERY THING *that Lawſon had in the World*; and imported that it was made to ſecure a large Sum (1800*l.* or upwards) It begun with a Recital "*Whereas I am obliged*, upon urgent and neceſſary Buſi- "neſs to *leave London*;" It recited alſo "That *Lawſon* had "not then Money enough by Him, nor could raiſe it ſoon "enough to anſwer all the Demands that *Wilſon* had upon "Him." There was no Counterpart: And the Original *remained in the* CUSTODY AND KEEPING OF THE ASSIGNOR. No other Poſſeſſion was delivered, but only that a Letter of Attorney was given to One *Betham* (who was Clerk to *Lawſon* and privy to the Whole, and who was concerned in the bad Part of circulating the Notes,) "to collect, receive, diſpoſe, *&c &c:*" But the Goods *continued in Lawſon*'s *Houſe*. *No Notice* was given to the *Debtors* of *Lawſon*, who owed him Money, till *Lawſon* went off; which was in a few Days after. At the Trial it appeared that the Debt really due to *Wilſon* from this *Lawſon*, was about 1840*l.*: although the Deed, which recited *Lawſon*'s Circumſtances to be bad, and their Manner of dealing, recited alſo that there might be about 3000*l.* that *Wilſon* might be *liable* to pay, but mentions *only* 30*l.* as *actually due*; And then aſſigns every Thing in the World to *Wilſon*; Debts *&c &c*, without any Exception whatſoever.

Mr. Serj. *Whitaker*, Mr. *Morton*, and Mr. *Yates* were of Counſel for the Defendant.

They argued that the Deed itſelf is FRAUDULENT, * §. 2. and an ACT *of Bankruptcy* within * 21 *J.* 1. *c.* 19. For it was *in Truſt for Lawſon himſelf* after *Wilſon* ſhould be paid; and was *executed privately*, at a Tavern, on the *Monday* at Night.

It was done *in Contemplation* of *Lawſon*'s Running away; And with *Intent* to give *Wilſon* the PREFERENCE *to other Creditors*; And was therefore a FRAUD upon the *Other* Creditors. It appears upon the Face of the Deed, "that *Lawſon* was then become *inſolvent*."

It aſſigns ALL his Effects whatſoever; and neither *values* the Effects aſſigned, nor *liquidates Wilſon*'s *Demand* upon *Lawſon*.

The *viſible Poſſeſſion* was *not altered: Betham remained* the acting Agent, *as before*.

* *V. ante* 467. This is like the Caſe of * Sir *Edward Worſely* v. *De Mattos et al'*, *H.* 1758. 31 *G.* 2. *B. R.*

Mr.

* Mr. *Norton* and Mr. *Aſton contra*, for *Wilſon* the Plaintiff. * P. 829.

This Caſe *differs* from that of *De Mattos*. This is only in the *Nature of a* MORTGAGE, to ſecure Mr. *Wilſon*'s Debt *only*, and indemnify Him againſt the other Demands to which he was liable, and what He was likely to ſuffer on *Lawſon*'s Account. The Sum of 1840*l.* was then actually due from *Lawſon* to *Wilſon*: And the principal Operation of this Deed was to ſecure that Debt.

And a Trader who is likely to become a Bankrupt *may* give the *Preference* to one Creditor, rather than to another, at any Time *before* his Bankruptcy.

But it will be objected, "that this Aſſignment was *under* "*a Contemplation* of his becoming Bankrupt; And there-"fore is itſelf an Act of Bankruptcy."

Anſwer. This is only, or chiefly, at leaſt, a Security for the 1840*l.* by way of Mortgage; And was therefore made for a *valuable Conſideration*.

The Deed does not import that he was *abſolutely* unable to anſwer the Demands upon him; but only "that he had "not *then* Money enough by him to anſwer them."

And the Occaſion and Neceſſity of his *Abſence* from *London* is expreſsly recited to be "*upon urgent and neceſſary* "*Buſineſs*:" Which is very different from his *Running away*, or *abſconding*.

The Intent of this Deed is, expreſsly, to retain *only ſo much* as will *ſatisfy Wilſon's Demands* (though thoſe Demands are not indeed particularly liquidated.)

Lord MANSFIELD thought it a plain Caſe, both upon the Deed, and upon the Collateral Circumſtances.

The Syſtem of the Bankrupt Laws is, that the Bankrupt's Effects ſhall be taken *out of* his *own* Poſſeſſion, and be divided *equally* amongſt ALL his Creditors.

In * *Gainor*'s Caſe, (of the black Ginger,) the Deed was holden to be *void*, and to be itſelf an *Act of Bankruptcy*: And yet, in that Caſe *only One* Creditor was virtually excluded.

* See this Caſe cited at large, in that of Sir *Edward Worſely et al*ª v. *De Mattos and Slader*, *ante* 477.

It

* P. 830. * It is not neceſſary that the Deed ſhould be fraudulent, *as between* the *Parties:* Nor is this Deed at all ſo; for it is a very *fair* Deed, as to the *Parties.* But it is made to PREFER this *Samuel Wilſon* to the Bankrupt's *other* Creditors.

Then he recited the Deed, and particularly the following Expreſſions in it; *viz.* "And whereas, by reaſon of &c, "I cannot at preſent raiſe &c, ſo ſoon as the Money due "to the ſaid *S. W.* will become payable; And whereas I "am obliged, on Account of neceſſary Buſineſs &c, to be "abſent &c." And He obſerved, that the Aſſignment is of *Every Thing that he had in the World*; not excepting even Apparel, &c.

Now though a Trader, *before* he becomes a Bankrupt may *prefer* One Creditor to Another, and may *pay* him his Debt; or may make a *Mortgage*, with *Poſſeſſion delivered*; Or (as was the Caſe of * *Small* v. *Oudley*,) may aſſign *Part* of his Effects to One particular Creditor; Yet an Aſſignment of his WHOLE Eſtate is of a very *different* Conſideration: THAT tends to *defeat the whole Syſtem* of the Bankrupt Laws.

* In *December* 1727. *in Canc'*; beſt reported in 2 *Peere Wms.* 427. But ſee it ſtated from the *Regiſter Book*, in *De Mattos*'s Caſe, *ante* 480, 481.

Here he aſſigns *All*, and inveſts his *own Clerk* with the Management of his Effects, *inſtead* of the *Commiſſioners.*

This Deed is an *Act of Bankruptcy*, *itſelf.* It defeats the whole Bankrupt Law: *Nothing* remains for the Creditors in any Shape; But his WHOLE Eſtate is put into the Hands of his *own Truſtees*, immediately. Therefore he is of Courſe a Bankrupt, the *Moment he has executed this* Deed: For there is Nothing at all left for his Creditors. And this is for an *unliquidated* Demand, too: Which makes it ſtronger.

Thus it ſtands upon the DEED.

But the CIRCUMSTANCES confirm it. For here is *no viſible Change of Poſſeſſion:* And the Letter of Attorney "to receive the Debts" is a *ſecret Tranſaction*, unknown to every body elſe; Whereas, according to the Caſe of † *Ryal* v. *Rowles*, there ought to be *Notice* to the Creditors.

† 27th *January* 1749: *in Canc'*. See this Caſe alſo cited and diſcuſſed in that of *De Mattos.*

Therefore I think this Deed is *in itſelf an Act of Bankruptcy.*

Mr. Juſt. DENISON concurred, for the ſame Reaſons.

And He alſo obſerved, that ſuch a Deed as this ought not to be eſtabliſhed; becauſe the whole Power that ought to be in the *Aſſignees*, is put into the Hands of *Betham* the *Bankrupt's*

* *Bankrupt's own Clerk:* Which is directly contrary to the very End and Intention of the Bankrupt-Laws. *P. 831.

It is apparent, that where a Trader conveys his WHOLE Eſtate and Effects, it muſt be with an *Intent to defeat his Creditors in general.* And here it is to ſatisfy an *unliquidated* Demand, too: Which is a Circumſtance that ſerves to confirm its being the Intention of the preſent Deed.

All theſe Caſes muſt depend upon their *Circumſtances:* And here they are as ſtrong as I ever met with. It is a Caſe *within* the LETTER of the Act.

Mr. Juſt. FOSTER—A Trader, *before* Bankruptcy, may *pay* a particular Creditor; Or He may mortgage his Effects to a particular Creditor, *with Poſſeſſion delivered*; And here it is a Mortgage, 'tis true, with a reſulting Truſt to *Lawſon:* But here is NO ALTERATION OF POSSESSION; *no* DELIVERY; (which is the Badge of Ownerſhip.) * *Twyne*'s Caſe. * 3 *Co.* 81. *a.*

This, If it were to be permitted, would *defeat the whole Syſtem* of the Bankrupt-Laws.

Mr. Juſt. WILMOT was of the ſame Opinion.

If this ſhould be allowed, it would *defeat all the Bankrupt-Laws.*

The Deed is a Conveyance of his WHOLE Eſtate and Effects: And it appears to be made, when the Trader was *inſolvent* and *Running away.*

A MORTGAGE by a Trader, of his Effects, is good, if he PARTS WITH *the Poſſeſſion:* And the Reaſon is, becauſe he *might* have abſolutely *ſold* it, and paid the Creditor the Money.

But here is a Conveyance of his WHOLE Eſtate and Effects; And NO POSSESSION DELIVERED; *no* ALTERATION *of Poſſeſſion:* But the ſame Perſon, *Betham*, continued to act, juſt as he was uſed to do before.

Therefore THIS DEED ALONE is an *Act of Bankruptcy*, without meddling with any other Circumſtances collateral to it.

This Conveyance of the WHOLE, without leaving *any Thing at all* remaining towards ſatisfying the reſt of his Creditors, is a very different Caſe from an Aſſignment of a particular Part of his Effects, to a particular Creditor.

Lord

*P. 832. * Lord MANSFIELD added, that a *Colourable Exception* of a *ſmall Part* of his Eſtate or Effects would not help the Matter: For the Court would never ſuffer that *an Evaſion* ſhould prevail, to take ſuch a Caſe out of the General Rule, which is ſo eſſentially neceſſary to be obſerved, in Order to a due Execution of this Syſtem of Laws.

The COURT was therefore unanimous, (and clearly ſo,) That there ought, in this Caſe, to be a JUDGMENT of NONSUIT entered for the DEFENDANT.

Rex *verſ.* Boyall.

MR. *Winn* ſhewed Cauſe againſt *quaſhing an Indictment* againſt the Defendant, a Pariſhioner of *Market-Deeping* in *Lincolnſhire*, for not ſending out his Carts *&c*, to the Six Days Highway Labour, purſuant to an Order from the Overſeers *&c*.

The Indictment ſets forth—That *John Mawley* and *J. Thornton*, on the 23d of *June &c*, at the Pariſh of *M.* BEING *then* and continually from thenceforth until after the 29th Day of the ſaid *June* the *Surveyors of the High-ways* in the ſaid Pariſh, did appoint the ſaid 29th Day of *June* for the providing Stones *&c*, for the Amendment of the Highways; the ſame being One of the Six Days appointed for providing Stones *&c*, for Amendment *&c*, in the Year for which they were Surveyors. Then it ſets forth that they gave public Notice in the Pariſh Church, of their having appointed the ſaid 29th of *June*, for providing Stones *&c*. But that nevertheleſs the Defendant, who on the ſaid 23d of *June*, and until and after the ſaid 29th of *June*, at the Pariſh aforeſaid, kept a Draught, well knowing the Premiſſes, did not find and ſend, on the ſaid 29th of *June*, One Wain or Cart furniſhed after the Cuſtom of the County with Oxen or other proper Cattle and other Neceſſaries meet to carry Things convenient for that Purpoſe, and alſo two able Men with the ſame, for the providing Stones *&c*, for Amendment of and working in the ſaid High-way in the Pariſh aforeſaid; but therein wholly neglected and made Default; In Contempt *&c*, and againſt the Form of the Statute *&c*.

V. 22 *C.* 2. *c.* 12. §. 9: (Which is the Statute here intended.)

Three Objections were taken to this Indictment: *viz.*

1ſt Objection—That *John Mawley* and *J. Thornton* are *not ſufficiently alledged to be Surveyors* of the ſaid High-ways:

* ways: It is only " that they BEING Surveyors &c;" * P. 833. And is not ſaid *by whom* they were appointed.

2d Objection—It is not ſaid, *on what Day* they were ſo *appointed:* Whereas a *particular Time is preſcribed* by the Act of Parliament, for their Appointment. *V.* §. 12. which limits it to *ſome* Day in *Chriſtmas Week.*

3d Objection—That a * PARTICULAR REMEDY is appointed by this Statute, of 22 *C.* 2. *c.* 12. namely, in §. 9. and 12: And therefore, this being a NEW OFFENCE created by this Statute, and the Statute *preſcribing a* PARTICULAR REMEDY, that particular Remedy muſt be *purſued*; And an INDICTMENT *will* NOT *lie.* * *V. ante*, 800 to 807. *Rex* v. *Robinſon:* particularly *pa.* 804.

Mr. *Winn*'s Anſwers to the Objections, were as follow.

To the 1ſt Objection, He anſwered, that 2 *Mod.* 128. *Rex* v. *Moor*, is in Point That the Words " BEING *above* " *ſuch an Age*," are good in an Indictment. And theſe Words are " BEING *then Surveyors.*"

To the 2d Objection,—He anſwered, That the Allegation " That they *being* then Surveyors," is ſufficient; *without* ſpecifying when they were ſo appointed.

To the 3d Objection—That this is *in itſelf* an *indictable* Offence; and was ſo, AT *the Making* of 22 *C.* 2. *c.* 12.

The Act of 2 & 3 *Ph.* & *M.* *c.* 8. is the firſt Statute that gives a Forfeiture for Default in this reſpect. The 5 *Eliz. c.* 13. §. 8. gives Power to the Seſſions, to proceed to enquire of Defaults and to aſſeſs Fines for them: (Which muſt be by way of *Indictment.*) In *Weſt's Precedents*, 2d *part*, §. 218. *Anno* 34 *Eliz.* there is an *Indictment* for this ſame Offence.

Or, perhaps, the Defendant might be out of the Juriſdiction of the Juſtices: And if ſo, the Juſtices could not proceed as the Act directs.

And this is a mandatory Statute.

Mr. *Vivian, contra.*

In ſupport of the 1ſt and 2d Objections—It ought to have been mentioned *by whom*, and *when* the Surveyors were appointed.

In

* P. 834. * *V. ante* 805. the true Rule of Diſtinction declared by Lord *Manſfield*.

* In Support of the 3d Objection, He cited 2 *Hawk. P. C.* 211. §. 4. Where the * Rule is particularly and expreſsly laid down. And 22 *C.* 2. *c.* 12. §. 9, preſcribes a particular Method: So alſo does §. 12. of the ſame Statute. In 7 *Rep.* 36. (On penal Statutes,) It was reſolved "that the "Act which gives the Penalty, ought to be purſued." *Brownl.* 106. *Rex* v. *Marriot*, 1 *Show.* 398. *Stephens* v. *Watſon*, 1 *Salk.* 45. *Palm.* 388. S. P. 2 *Ro. Rep.* 299. *Cro. Jac.* 643. *Caſtle's* Caſe. *Queen* v. *Watſon*, cited in 6 *Mod.* 86. *Rex* v. *Dawyes*, 3 *Keb.* 34. *Rex* v. *Sparks*, 3 *Mod.* 79.

Lord MANSFIELD—

† See it cited at large *ante* 803, 804. ‖ *V. ante*, 805. *accord.*

As to the 3d Objection—It was an *Offence Indictable*, BEFORE the Appointment of the Summary Remedy preſcribed by the Statute of 22 *C.* 2. The Caſe of † *Rex* v. *Davis*, *M.* 28 *G.* 2 *B. R.* was of the ſame kind. Therefore the Summary Juriſdiction is ‖ CUMULATIVE, (although there is another Remedy given,) and *does* NOT *exclude* the Common-Law Remedy.

‡ *V. ante*, 804. *accord.*

I do not approve of *indicting*, where there is another Remedy: It carries the Appearance of ‡ Oppreſſion. Yet it is not to be underſtood that We are OBLIGED to quaſh Indictments upon *Motion*, in *every* Caſe, where they are not to be ſupported upon a *Demurrer*.

As to the 1ſt Objection—"*Being*" is a ſufficient Averment.

And the 2d Objection has Nothing in it.

Mr. Juſt. DENISON concurred.

The RULE was therefore DISCHARGED.

Thurſday 3d *July* 1759.

Rex. *verſ.* Cowle.

ON ſhewing Cauſe (upon *Tueſday* 23d *January* laſt, why a SUPERSEDEAS ſhould not iſſue, to a CERTIORARI directed to the Mayor and Corporation-Juſtices of BERWICK, "to remove an *Indictment* for an Aſſault;" and alſo on the Adverſe Party's ſhewing Cauſe (at the ſame Time) againſt other * Croſs-Rules for ATTACHMENTS againſt the Juſtices to whom the ſaid *Certiorari* was directed, "for refuſing to receive or return the ſaid "*Certiorari*; and for committing the Defendant to Priſon "on his Refuſal to plead in their Court of Seſſions and "Gaol-Delivery, after he had offered his *Certiorari* to them, "and tendered ſufficient and proper Security thereupon;—"

* See both Rules (*verbatim*) at the End of this Caſe, *pa.* 864.

It

* It was inſiſted by Sir *Richard Lloyd*, Mr. *Clayton*, and Mr. *Selwyn*, who were Counſel for the Corporation-Juſtices (and conſequently, argued for the *Superſedeas*, and againſt the Attachments,) That *this* Court have *no Juriſdiction* over BERWICK; where the Proceedings are *not according* to the Laws of *England*, but according to a quite *different Law*. * P. 835.

BERWICK, they ſaid, was formerly *Part of* SCOTLAND, and was ours only by *Conqueſt*, and remains un-incorporated with *England*, and is governed by its *own* former Laws.

It is in the very ſame Situation as *Ireland* was, immediately after it's being conquered. *(V.* 8th *Vol.* of *State Trials*, *Pa.* 346. *Prynne's Argument in Lord Magwire's Caſe.)*

A *conquered Country* retains its *own* Laws, *till others* are given by the Conquerors.

No Certiorari therefore lies, to BERWICK.

The proper Method would be, to iſſue a Commiſſion, to judge according to their own Laws. So, as to *Jamaica*, *Guernſey*, *Jerſey*, *Sarke &c.* * 2 *Salk.* 411. *Blanckard* v. *Galdy*. *Hale's Hiſtory of the Common Law*, 183, 186, 187, 188, 189. *Calvin*'s Caſe, 7 *Rep.* 21, 23. * *V.* 4 *Inſt.* 286.

But ſuppoſe the *King* Himſelf to be a *Party*, It may be ſaid "that He *may chooſe his Court.*" Yet ſtill it ought to be tried according to the *Laws* of the *Place* where the Cauſe ariſes. And *Hale* 186. does not contradict this: For he does not ſay where it ſhall be tried.

In 11 *E.* 3. (amongſt the Records of the *Tower)* as is aſſerted in *Calvin*'s Caſe, 7 *Rep.* 23. *a. b.* there is a Commiſſion to the King's Juſtice of *Berwick upon Tweed* and *Scotland*, to try according to the Laws of the *Place*, "*Se-*"*cundùm legem et conſuetudinem Regni Scotiæ.*" And as *Berwick* is in *no County*, *How* or *where* could this Matter be tried, if a *Certiorari* ſhould go?

A *Certiorari* is a *mandatory* Writ *remedial*. Therefore it can *not extend beyond the Realm of England*. *Calvin*'s Caſe 20. *a.* is expreſsly ſo. And *no Certiorari* ever *did go*; ſo as that there has been any Proceeding upon it: Perhaps they may have been ſent out *ex improviſo*; And nothing further done upon them.

To prove "that *Berwick* is no Part of *England*," they cited 1 *Sid.* 381. 462. *Jackſon and Criſpe* v. *Mayor &c. of Berwick*;

* P. 836. * *Berwick*; and *Godbolt* 387. *Cremer and Tookley*'s Caſe; where a Caſe is cited, of "Debt and an Obligation, and the "*Venue* laid at *Berwick*; which was adjudged againſt the "Plaintiff; *becauſe the Court had* NOT *Juriſdiction.*

Informations indeed were latety granted, for Bribery in the Election for *Berwick*; though they never came to any Effect. (*Rex* v. *Watſon*, *Hil. & Paſch.* 1755.)

The Act of 8, 9 *W.* 3. *c.* 33. (which perpetuates 5, 6 *W. & M. c.* 11.) requires the Recognizance to be conditioned "to try at the next Aſſizes *for the County*, where "the Indictment was found." But *Berwick* is no County of *England*. 2 *Show.* 365. Mayor of *Berwick*'s Caſe declares ſo, And that the King's Writ does not run into *Berwick.*

Therefore if this *Certiorari* ſhould be granted, it would occaſion a Failure of Juſtice.

Lord MANSFIELD ſaid, it was neceſſary for the Court to know the *Conſtitution* of *Berwick* perfectly, and ſearch it to the Bottom, before they could give any Opinion. And for that Purpoſe,

Both THE COURT themſelves, and likewiſe the Defendant's Counſel, deſired an Opportunity of ſeeing the *Charters* of that Town.

The whole Matter was therefore ADJOURNED; that the Charters of the Corporation of *Berwick* might be inſpected and produced: Which was accordingly afterwards done. And

The Subſtance of their ſeveral Charters is as follows—

From the Year 1296, (when this Town was conquered by *Edward* the Firſt,) this Corporation hath had ſeveral Charters granted to it by different Kings and Queens of *England*; particularly One in the Reign of *Edward* 4th; In the Introduction to which, it appears "that ſeveral Char-"ters had been granted to the Town of *Berwick*, by his "Anceſtors, *before* his Reign." It is to this Effect—

* *Edw.* 4th * *Edward* by the Grace of God King of *England* and of *France* and Lord of *Ireland*, To all Arch-biſhops Biſhops Abbots Priors Dukes Earles Barons Juſtices Sheriffs Miniſters and to all Bailiffs and his faithful People Greeting—We
† *Edw.* 3d. have ſeen the Charter of † *Edward* late King of *England* our Progenitor, made in theſe Words,—*Edward* by the Grace of God King of *England* and of *France* and Lord of *Ireland*, To all Arch-Biſhops *&c. &c.* We have ſeen the Charter which We lately cauſed to be made, in theſe Words

* Words *Edward* by the Grace of God King of *England* and Lord of *Ireland*, To all Arch-Biſhops &c. It appears to Us by Inſpection of the Rolls of the Chancery of * *Edward* late King of *England* our Grandfather, that our ſaid Grandfather cauſed his Charter to be made in theſe Words, " *Edward* by the Grace of God King of *England* " Lord of *Ireland* and Duke of *Aquitain*, To all " Arch-Biſhops Biſhops Abbots Priors Earls Barons Juſtices " Sheriffs Mayors Miniſters and to all Bailiffs and " others his faithful People, Greeting: Know Ye " &c." It makes this Town of *Berwick* a Free Burrough, and the Men of it Free Burgeſſes: And after granting to them all the Liberties and free Cuſtoms of a free Burrough for ever, and impowering them to hold Guilds and chooſe a Mayor (to be ſworn in before the King, or before the Chancellor or Treaſurer and Barons of *Scotland*, if the King be not preſent,) and 4 Bailiffs, this Charter goes on as follows (*viz.*)—" We further grant, that the aforeſaid " Burgeſſes and their Heirs their Tenements which they " have within the ſaid Burrough and ſhall have hereafter, " in their laſt Will and Teſtament may freely bequeath to " whom they will, without Lett of Us or our Heirs or " Miniſters whatſoever; And that they ſhall *not implead* " *nor be impleaded* ELSEWHERE THAN WITHIN *the* " *ſame Town or Burrough before the Mayor and Bailiffs* " *aforeſaid, de aliquibus Tenuris intrinſecis Tranſgreſſionibus* " *aut Contractibus intra eundem Bugum factis.* We grant " furthermore (to the aforeſaid Burgeſſes) that they have " the *Return of all our Writs* touching that Burrough; So " that no Sheriff nor other Bailiff or Miniſter of ours enter " that Burrough, to do any Office there for any Thing to " that Burrough belonging, but in Default of the Mayor " and Bailiffs of the ſame Burrough: And that the ſaid " Burgeſſes and their Heirs, *per brevia noſtra de cancellaria* " *Scotiæ*, may chooſe a Coroner *de ſeipſis* &c." Then it grants a Priſon, and ſeveral Privileges.

*P. 837.

* *Edw.* 1ſt.

" Furthermore We will and grant that the ſaid Burgeſſes " ſhall not be put upon any Aſſizes Juries or Recognitions, " by reaſon of their Intrinſic Tenure, againſt their Wills, " out of the aforeſaid Burrough."

This Charter of *Edward* 1ſt grants two Markets, a Fair, and ſundry other Privileges to this Corporation; and bears Date on the 4th of *Auguſt Anno Regni* 30.mo

The Charter of *Edward* 3d recites " That the former " Charter (of *Edward* 1ſt) afterwards fell into the Hands " of *Robert A Brus*, when He took the Town of *Berwick*; " and was carried away by Him:" But *Edward* 3d by his firſt Charter (dated 4th *June Anno regni* 10.) exemplifies and confirms it; And by his ſecond Charter (dated 28th *March Anno regini* 30.°) which is an Inſpeximus of his own former Charter, he furthermore grants and confirms as follows —" And becauſe We are ſo much the more affectioned to

" our

* P. 838. " our Realm of *Scotland*, for that the ſaid Realm, by our " well beloved and truſty Couſin *Edward Baliol* the King " of the ſaid Realm of *Scotland*, was to Us given and " granted; And therefore We affect, with a more earneſt " Deſire, the Honours and Advantages as well of the ſame " Realm, as of the Town of BERWICK *upon Tweed*, " *which*, from the Hands of the *Scots* our Enemies (who, " at the Time that We were employed in the Parts of " *France* about the Expedition of our Wars there, had in- " vaded and taken it,) is *by Us newly conquered*; We have " granted and by this our Charter confirmed, for Us and " our Heirs, that our Burgeſſes of the ſaid Town of *Ber-* " *wick* their Heirs and Succeſſors in the ſame Town abid- " ing and reſident, Have and Hold all and ſingular the " Liberties above ſpecified, and the ſame Liberties and " every of them from henceforth fully enjoy and uſe; And " likewiſe that the ſame Burgeſſes their Heirs and Succeſſors " be *ruled by* THE SAME LAWS CUSTOMS AND " USAGES that the Burgeſſes of the ſame Town had and " uſed *in the Time of* ALEXANDER of famous Memory " *late King of Scotland*; without Impeachment of Us or " our Heirs Juſtices Eſcheators Sheriffs or other our Bailiffs " or Miniſters whatſoever; And that the Cuſtomers " Weighers and all other Officers whatſoever that in the " ſame Town ſhall happen to be aſſigned by Us or our " Heirs, be reſident and abiding upon their Offices continu- " ally, So that by their Abſence or Default Merchants " upon Delivery of their Merchandiſe be not lett nor hin- " dered; And the ſaid Cuſtomers Weighers and Officers, " *or Burgeſſes of the ſame Town, to give an Account for any* " *Thing touching the ſaid Town, or their Offices in the ſaid* " *Town, or to anſwer for any Treſpaſſes, Debts Covenants or* " *any Contracts made or to be made in the ſame Town, for* " *the which they ſhall be bound to anſwer to Us or our Heirs,* " SHALL NOT BE COMPELLED TO COME ELSE- " WHERE *than before our Chamberlain of the ſame Town of* " *Berwick or our Juſtices thereunto aſſigned* WITHIN *the* " *ſaid Town of* BERWICK: So that the Chamberlain " always of the aforeſaid Town for the Time being, " for all Things touching *his* Office, ſhall make his Ac- " count *before our Treaſurer and Barons of our Exchequer of* " ENGLAND, *as before this Time hath been accuſtomed.*"

The Charter of *Edw.* 4th concludes with approving and confirming *Cartam prædictam* (the 2d Charter of *Edw.* 3d) and bears Date on the 18th of *February Anno regni* 22mo.

QUEEN ELIZABETH, by Letters Patent granted to the Town of *Berwick*, dated 4th *May Anno regni* 1mo. after mentioning the Letters Patent of Queen *Mary* and of King *Henry* the 8th, and the above Charter of *Edward* the 4th ratifies and confirms every Thing contained in *Edward* the 4th's Charter, *H.* 8th's and Queen *Mary*'s: Which Charter of Queen *Mary* is dated on the 25th of *April Anno regni primo*,

* *primo*, and is an Inſpeximus and Confirmation of that of King *H.* 8th. which Charter of *H.* 8th. bears Date on the 6th *November* 2 *H.* 8. and is an Inſpeximus and Confirmation of the Charter of *Edward* the 4th. * P. 839.

But the Charter under which the Corporation of *Berwick* now claim All their Privileges, and which is confirmed to them by * Act of Parliament, is that which was granted them by King *James* the 1ſt, dated 30 *April Anno regni ſecundo.* The Preamble to which, is as follows— * 1 & 2 *Jac.* 1. *c.* 28.

James &c. Whereas our Burrough of *Berwick upon Tweed* is an ancient and populous Burrough; and the Burgeſſes of the ſaid Burrough, ſometimes by the Name of Mayor Bailiffs and Burgeſſes of the ſame Burrough, and ſometimes by other Names, have had, uſed and enjoyed divers Liberties Franchizes Immunities Cuſtoms Pre-eminences and other Hereditaments, as well by divers Charters and Letters Patent of divers our Progenitors and Predeceſſors Kings and Queens of *England*, as alſo by reaſon of divers Preſcriptions and Cuſtoms uſed and had within the ſaid Burrough; And whereas our well-beloved Subjects the now Mayor Bailiffs and Burgeſſes of the Burrough of *Berwick upon Tweed* aforeſaid have humbly beſeeched Us "that We "would exhibit and extend our Royal Grace and Bounty to "the ſaid Mayor Bailiffs and Burgeſſes on this Behalf, and "that we will vouchſafe (for the better governing ruling "and bettering of the ſaid Burrough) by our Letters Patent "to make reduce conſtitute and create anew the ſaid Mayor "Bailiffs and Burgeſſes into One Corporate and Politic "Body, by the Name of Mayor Bailiffs and Burgeſſes of "the Burrough of *Berwick upon Tweed*, with Augmentation "and Additions of certain Liberties Privileges Immunities "and Franchizes as to Us ſhall ſeem moſt expedient;" We therefore, willing that from henceforth for ever hereafter there be continually had and uſed one certain and undoubted Manner in our ſaid Burrough, of in and about the *keeping of our Peace*, and for the ruling of the ſaid Burrough and of our People there inhabiting and of others thither reſorting, And that the ſaid Burrough may be and remain in all future Times a Burrough of Peace and Quiet, to the Fear and Terror of evil and the Reward and Nouriſhing of good Men, And alſo *that our Peace and other Facts of Juſtice and good Government may the better there be kept and done*; and hoping that if the Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors may by our Royal Grant enjoy greater and larger Dignities Privileges Juriſdictions Liberties and Franchizes, then they will think themſelves more eſpecially and ſtrongly obliged unto the Performance and Execution of their beſt Service to Us our Heirs and Succeſſors; And alſo at the humble Petition &c &c We have willed ordained &c And by theſe Preſents &c Do will and ordain &c.

In

* P. 840. * In this Chapter, amongſt many other Privileges, are the following: *viz.* A Power to make By-Laws, and to fine or impriſon ſuch as break them; and alſo theſe enſuing Clauſes—

Power to hold a Court.

And We will, and for Us our Heirs and Succeſſors Do grant to the ſaid Mayor Bailiffs and Burgeſſes and their Succeſſors, that they and their Succeſſors, from henceforth for ever hereafter, may have and hold, and may be able to have and hold within the ſaid Burrough, *a Court of Pleas*, every *Tueſday* in every ſecond Week throughout the Year, to be holden *before the Mayor Bailiffs and Recorder* of the ſaid Burrough for the Time being, or before any three of them (whereof We will that the *Mayor* of the ſaid Burrough for the Time being ſhall be *One*,) in the Guild-Hall or Toll-Booth of the ſaid Burrough; And that they may hold, in that Court, by Plaints in the ſame Court to be levied, or otherwiſe according to the laudable and reaſonable Cuſtoms before uſed and accuſtomed in the ſaid Burrough, *All* and *all Manner of* Pleas Actions Suits Complaints and Demands, as well real as perſonal and mixed, of all perſonal Tranſgreſſions whatſoever with Force and Arms, and of whatſoever other Tranſgreſſions done moved ariſing had or committed or hereafter to be done moved had or committed within the ſaid Burrough Suburbs Liberties and Precincts thereof, And of all and all Manner of Intruſials Tenures Burgages Lands Tenements Goods Chattels Debts Pleas upon the Caſe Deceits Accounts Covenants Detinues of Charters Eſcripts Muniments and Chattels, the taking and detaining of Beaſts and Cattle, and other Contracts whatſoever of whatſoever Cauſe or Thing ariſing or in Time to come happening to ariſe within the ſaid Burrough Suburbs Liberties and Precincts thereof, to whatſoever Sum or Value the ſaid Tranſgreſſions Debts Accounts Covenants Deceits Detinues or other Contracts ſhall amount; And that ſuch like Pleas Plaints Quarrels Suits and Accounts may be there heard and determined before the ſaid Mayor Bailiffs and Recorder of the ſaid Burrough for the Time being or any 3 of them (whereof we will that the Mayor of the ſaid Burrough for the Time being ſhall be One) by ſuch and ſuch like Proceedings Ways and Means *according to the Laws and Cuſtoms of our Kingdom of England, or according to the ancient reaſonable and laudable Cuſtoms of the ſaid Burrough heretofore uſed and allowed in the ſaid Burrough*, and in as large Manner and Form as in any Court of Pleas in any City Burrough or Town Corporate within this our Kingdom of *England* or in our ſaid Burrough of *Berwick upon Tweed* heretofore hath been uſed and accuſtomed or may or ought to be done.

Cognizance of Pleas, as anciently accuſtomed.

And further We will, and by theſe Preſents for Us our Heirs and Succeſſors Do Grant to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, that they and their Succeſſors from Time to Time

in

* in all iſſuing Times may have and may be of Force to have * P. 841.
the Cognizance of all and all Manner of Pleas Quarrels Plaints Actions and Demands whatſoever as well real as Perſonal and mixed, in what Courts ſoever of Us our Heirs and Succeſſors moved and begun or to be moved and begun, of whatſoever Things Cauſes and Matters happening ariſing or growing within the ſaid Burrough Suburbs Liberties and Precincts thereof, as they have been anciently accuſtomed within the ſaid Burrough.

Furthermore, We will, and by theſe Preſents for Us our Heirs and Succeſſors Do Grant to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, that the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough for the Time being be not put in Aſſiſe Juries Attaints or other Recognizances, by reaſon of any Intruſials Tenures or againſt their Wills, without the ſaid Burrough; And that the ſaid Burgeſſes of the ſaid Burrough and their Succeſſors be not conſtrained or compelled by Us our Heirs or Succeſſors or our Officers or Servants of Us our Heirs or Succeſſors, to go or to be ſent to *War* without the ſaid Burrough and Suburbs Liberties and Precincts thereof, but by the Special Commandment of Us our Heirs and Succeſſors, as before in the ſaid Burrough hath been lawfully uſed and accuſtomed; And that no Man may take Lodging within the ſaid Burrough by Force or by Livery of our Marſhals of Us our Heirs or Succeſſors. We have granted, moreover, and by theſe Preſents for Us our Heirs and Succeſſors of our ſpecial Grace and of our certain Knowledge and mere Motion Do Grant to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, that they may have the Return of all our Writs Precepts and Proceſs of Us our Heirs and Succeſſors, of whatſoever Courts of Us our Heirs or Succeſſors coming and ariſing within the ſaid Burrough, and the Execution of them; So that no Sheriff Miniſter or Bailiff for us our Heirs or Succeſſors ſhall enter into the ſaid Burrough Suburbs, Liberties or Precincts thereof, to do any Office there for any belonging to the ſaid Burrough, but in Default of the Mayor and Bailiffs of the ſaid Burrough. And further, of our Special Grace and of our certain Knowledge and mere Motion, We have given and granted and by theſe Preſents for Us our Heirs and Succeſſors Do give and grant to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, that the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough or any of them, or the Cuſtom-Houſe Officers or Weighers of Us our Heirs and Succeſſors within the ſaid Burrough for the Time being or any of them, ſhall not be employed nor ſhall be compelled to anſwer for any Intruſials Tenures or Tranſgreſſions Debts Contracts Accounts or any other Cauſes or Things within the ſaid Burrough Suburbs Liberties Limits or Precincts thereof done or to be done, elſewhere than within the ſaid Burrough before

Not to be put in Aſſiſe &c. *extra Burgum.*

Not to be ſent to War &c. unleſs &c.

Return and Execution of Writs within the Burrough.

Not to be compellable to anſwer &c. *extra Burgum.*

* P. 842. * the Mayor and Bailiffs of the ſaid Burrough and their Succeſſors, or before the Juſtices of Us our Heirs and Succeſſors aſſigned unto it within the ſaid Burrough and not elſewhere.

Mayor &c, to be Juſtices of the Peace &c, *intra Burgum.*

And further We will, and by theſe Preſents for Us our Heirs and Succeſſors Do Grant to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, that the Mayor of the ſaid Burrough for the Time being, and the Recorder of the ſaid Burrough for the Time being, and ſuch Burgeſſes and Aldermen of the ſaid Burrough who have ſuſtained the Office of Mayor of the ſaid Burrough or hereafter ſhall ſuſtain it, after they have executed the ſaid Office of Mayoralty, as long as they ſhall be Burgeſſes and Aldermen of the Burrough, and every one of them may and ſhall be for ever hereafter from henceforth, within the ſaid Burrough and within the Suburbs Liberties and Precincts thereof, our Juſtices for Us our Heirs and Succeſſors to keep and preſerve and cauſe to be kept and preſerved the Peace of Us our Heirs and Succeſſors within the ſaid Burrough Liberties and Precincts thereof, And alſo to keep and cauſe to be kept all Ordinances and Statutes for the Good of our Peace and for the Preſervation of the ſame and for the quiet Ruling and Governing our People publiſhed within the ſaid Burrough Suburbs Liberties and Precincts thereof in all their Articles according to the Force Form and Effect of ſuch Ordinances and Statutes, And to chaſtiſe correct and puniſh all and all Manner of Perſons whatſoever of what Eſtate Degree or Condition ſoever they ſhall be, offending againſt the Form of thoſe Ordinances and Statutes or any of them within the ſaid Burrough Suburbs Liberties and Precincts thereof, and to do that all thoſe within the ſaid Burrough Suburbs Liberties and Precincts thereof who ſhall threaten any of our People to hurt their Bodies or burn their Houſes to find ſufficient Security before them or any of them for the Peace and good Behaviour towards Us and our liege People, and if they ſhall refuſe to find ſuch Security then to cauſe them to be ſafely kept in the Gaol and Priſon of the ſaid Burrough until they find ſuch Security;

Juſtices of *Oyer and Terminer, intra Burgum.*

And that the Mayor Recorder and ſuch of the Aldermen or Burgeſſes of the ſaid Burrough who have at any Time borne the Office of Mayor or hereafter ſhall bear it, after they have borne the ſaid Office of Mayor of the ſaid Burrough and as long as they ſhall be Burgeſſes or Aldermen of that Burrough, or any three or more of them (whereof We will that the Mayor and Recorder of the ſaid Burrough for the Time being be Two) may have from henceforth for ever hereafter full Power and Authority from Time to Time to enquire and determine within the ſaid Burrough Suburbs Liberties and Precincts thereof of all and all Manner of Felonies Murders Homicides Robberies Aſſaults Riots Routs Forces [forcible] Entries into Lands and Tenements Treſpaſſes againſt the Peace of Us our Heirs and Succeſſors unlawful Conventicles Ambidexters Conſpiracies Contempts

* Contempts Concealments, And alſo of all Miſpriſions Offences Miſdeeds Defaults Negligences Cauſes and Articles which do belong or hereafter may be able to belong to the Authority or Power of Juſtices or Keepers of the Peace of Us our Heirs or Succeſſors, in as ample Manner and Form as any Juſtices or Keepers of the Peace of Us our Heirs or Succeſſors in any of our Counties within this our Kingdom of *England, by the Laws and Statutes of the* SAME *Kingdom*, for the Offence ſo done and committed in the ſaid County, as Juſtices of the Peace, may be and may be able to hear and determine. And alſo We will, and by theſe Preſents for Us our Heirs and Succeſſors Do grant to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, That the Mayor and Recorder of the ſaid Burrough for the Time being, and ſuch like Burgeſſes and Aldermen of the ſaid Burrough who at any Time have borne or hereafter ſhall bear the Office of Mayor of the ſaid Burrough, after that they have borne the ſaid Office, as long as they ſhall be Burgeſſes and Aldermen of the ſaid Burrough, or any three or more of them (whereof We will that the Mayor and Recorder of the ſaid Burrough ſhall be Two,) from Time to Time hereafter may be our Juſtices, And every one of them from Time to Time may be Juſtices of Us our Heirs and Succeſſors, from Time to Time to deliver the Gaol of the ſaid Burrough of the Priſoners being therein; And that the Coroner for the Time being ſhall make Return from Time to Time of all Juries Inquiſitions Pannels Attachments and Indentures by him taken or hereafter to be taken before the ſaid Mayor Recorder and the ſaid Burgeſſes or Aldermen of the ſaid Burrough for the Time being or any three or more of them (whereof We will that the Mayor and Recorder of the ſaid Burrough for the Time being ſhall be Two,) when and as often as they will deliver the ſaid Gaol of the Priſoners being in that Gaol; and be attending them in all Things touching the ſaid Gaol-Delivery, and the Commandments of the ſaid Mayor Recorder and Burgeſſes or Aldermen aforeſaid for the Time being or any three or more of them (whereof We will that the Mayor and Recorder of the ſaid Burrough be Two) ſhall execute from Time to Time, *in the ſame Manner and Form* as any Sheriff of our Kingdom of *England* have accuſtomed and ought to do return intend and execute (any Manner of way) *by the Laws and Statutes of this our Kingdom of* ENGLAND, before the Juſtices of Gaol Delivery in any the Counties of the *ſaid Kingdom*; And that the ſame Mayor Recorder and Aldermen of the ſaid Burrough for the Time being or any three or more of them (whereof We will that the Mayor and Recorder of the ſaid Burrough for the Time being be Two) may have and ſhall have, and may erect from henceforth hereafter, a Gallows within the ſaid Burrough Suburbs Liberties or Precincts thereof, to hang and execute Felons Murderers and other Malefactors within the ſaid Burrough adjudged to Death *according to the*

* P. 843.

And of Gaol-Delivery, *intra Burgum.*

The Coroner to return Juries &c. to attend the ſaid Juſtices o Gaol Delivery, and execute their Commands as Juſtices of Gaol Delivery.

Power to erect a Gallows, *intra &c.*

* P. 844. And to arreſt and commit Felons &c.

* *Laws of England*; And that the ſaid Mayor, Recorder, and ſuch like Burgeſſes or Aldermen of the ſaid Burrough who at any Time have borne the Office of Mayor of the ſame Burrough or hereafter ſhall bear it, after that they have borne the ſaid Office, as long as they ſhall be Burgeſſes or Aldermen of the ſaid Burrough or any three or more of them (whereof We will that the Mayor and Recorder of the ſaid Burrough for the Time being ſhall be Two,) may take and arreſt whatſoever Felons Thieves or other Malefactors within the ſaid Burrough Suburbs Liberties and Precincts thereof found or to be found, by themſelves or by their Miniſters or Deputies conſtituted in the ſaid Burrough; And that they may carry them to the Gaol within the ſaid Burrough, there to be kept in ſafe Cuſtody until by due Proceſs of Law they ſhall be delivered, any other Ordinance Decree or Cuſtom to the Contrary notwithſtanding. Moreover We have granted and by theſe Preſents for Us our Heirs and Succeſſors of our ſpecial Grace certain Knowledge and mere Motion Do grant to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, That they and their Succeſſors from henceforth for ever hereafter may have enjoy and receive and may be able and of Power to have enjoy levy and receive, to the proper Uſe and Behalf of the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, All and all Manner of Fines Ranſoms and Amerciaments whatſoever or for whatſoever Treſpaſs or other Offence or other Matters and Cauſes committed and to be committed within the ſaid Burrough Suburbs Liberties and Precincts thereof, And all and all Manner of Fines Iſſues Amerciaments Forfeitures Profits and Perquiſites of the ſaid Court, ſo to be impoſed or forfeited before the ſaid Mayor Recorder and Bailiffs in the Court of the ſaid Burrough, And before the ſaid Mayor Recorder and the ſaid Aldermen of the ſaid Burrough or any 3 or more of them as aforeſaid as Juſtices of the Peace or of our Gaol-Delivery within the ſaid Burrough Liberties or Precinct thereof, for whatſoever Cauſe or Cauſes coming happening ariſing or growing, as before hath been uſed and accuſtomed in the ſaid Burrough; And alſo all and all Manner of Goods and Chattels whatſoever waived, Deodands, Chattels of Felons and Fugitives outlawed and to be outlawed waived and to be waived condemned and to be condemned adjudged and to be adjudged attainted convicted and to be convicted, of Fugitives and Men put in Exigents of all and ſingular Tenants Inhabitants and Men Reſident in the ſaid Burrough Suburbs Liberties and Precincts thereof, from Time to Time ariſing happening and coming; And that it ſhall be lawful to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, the ſame Fine Iſſues Amerciaments Forfeitures and Profits from Time to Time to levy and collect, by the proper Miniſters of the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough, according to the Laws and Cuſtoms of *England*, or according to the ancient Cuſtoms of the ſaid Burrough.

The Corporation to have all Fines, &c.

and Deodands, Goods of Felons and Fugitives &c. &c.

And

* And further, of our abounding ſpecial Grace and of our certain Knowledge and mere Motion, We grant and confirm, for Us our Heirs and Succeſſors, to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, All and all manner of lawful Liberties Grants Franchizes Immunities Privileges Exemptions Quittances Juriſdictions Cuſtoms and free Uſages, as well by Land as by Water, as well within as without the ſaid Burrough Suburbs Liberties Limits and Precincts thereof, through our whole Land and Power, in theſe our preſent Charters or in any other Charters of our Progenitors or Predeceſſors Kings and Queens of *England* expreſſed or not expreſſed; And alſo all and ſingular ſuch Lands Tenements Hereditaments Cuſtoms Liberties Privileges Franchizes Immunities Quittances Exemptions and Juriſdictions, which the Mayor Bailiffs and Burgeſſes of the ſaid Burrough or any of them, by what Means or Names ſoever, or by what Incorporation ſoever or Pretence of any Incorporation, heretofore have had uſed or enjoyed or ought to have hold uſe or enjoy, to them or their Succeſſors for ever, of State of Inheritance, by Reaſon or Pretext of any Charters or Letters Patent or of any Uſe Preſcription or Cuſtom or by any other Manner Right or Title heretofore had uſed or accuſtomed; Notwithſtanding that any Charters aforeſaid were carried away and removed from thence, by *Robert Bruce* King of *Scotland*, our Progenitor; And notwithſtanding that the ſaid Burrough of *Berwick* hath come into the Hands of our Progenitors Kings of *Scotland*, after the ſaid Grants of our ſaid Progenitors Kings of *England*; And although the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough or their Predeceſſors or Burgeſſes of the ſaid Burrough or any of them, by whatſoever Name or Names or by whatſoever Incorporation or Pretext of any Incorporation heretofore known or incorporated or not incorporated, have uſed or enjoyed or not uſed or enjoyed the ſaid Liberties Grants Franchiſes Immunities Privileges Uſages and free Cuſtoms: And We, of our ſpecial Grace, All and ſingular the Things above before granted and recited, for Us our Heirs and Succeſſors, to the ſame Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, Do grant and confirm and for ever ſtrengthen, by theſe Preſents. Wherefore We will and firmly command, for Us our Heirs and Succeſſors, that the ſaid Mayor Bailiffs and Burgeſſes and their Succeſſors may have hold uſe and enjoy for ever all Liberties Authorities Juriſdictions Franchizes and Quittances aforeſaid, according to the Tenor and Effect of theſe our Letters Patent, without Lett or Hindrance of Us our Heirs and Succeſſors, or Juſtices Sheriffs or other Bailiffs or Miniſters whatſoever, or of any other of them; Nulling and forbidding that the ſame Mayor Bailiffs and Burgeſſes and the Men of the ſaid Burrough, or any of them, or any of the Burgeſſes of the ſaid Burrough,

* P. 845.

Confirmation of Liberties, Grants, &c.

by

* P. 846. * by reaſon of the Premiſſes or any of them, by Us or by our Heirs Juſtices Sheriffs Eſcheators or other Bailiffs or Miniſters of Us our Heirs or Succeſſors whatſoever, be letted moleſted or grieved, or in any Thing diſturbed thereof.

Some other Clauſes of the Charter, (and which were produced by thoſe who ſupported the Rule for the *Certiorari*,) were as follow—

Power to make By-Laws.

And further, of our abundant Grace, We will, and by theſe Preſence for Us our Heirs and Succeſſors Do grant to the ſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, That the Mayor Bailiffs and Burgeſſes of the Burrough aforeſaid or the greater Part of them (whereof We will that the Mayor of the ſaid Burrough for the Time being ſhall be One) ſhall have and by theſe Preſents may have full Authority Power and Faculty of framing conſtituting appointing ordaining making and eſtabliſhing, from Time to Time, ſuch like Laws Statutes Ordinances and Conſtitutions which to them or the greater Part of them (whereof We will that the Mayor for the Time being of the ſaid Burrough ſhall be One,) in their beſt Diſcretion ſhall be thought to be good profitable wholeſome honeſt and neceſſary for the good Rule and Government of the Mayor and Bailiffs and Burgeſſes aforeſaid and all and ſingular other Burgeſſes Officers Miniſters Artificers Inhabitants and Reſidents whatſoever within the ſaid Burrough for the Time being.

Power to fine impriſon or amerce ſuch as break them; and to levy ſuch Fines &c, to the Uſe of the Corporation.

And that the Mayor Bailiffs and Burgeſſes of the Burrough aforeſaid for the Time being, or the greater Part of them (whereof We will that the Mayor of the ſaid Burrough for the Time being be One,) as often as they ſhall frame eſtabliſh or ordain ſuch like Laws Inſtitutions Orders Ordinances and Conſtitutions in Form aforeſaid, may and may have Power to make ordain limit and provide ſuch like Pains Puniſhments and Penalties, by bodily Impriſonment or by Fines and Amerciaments or by either of them, upon and againſt all Offenders againſt ſuch the Laws Inſtitutions Decrees Conſtitutions and Ordinances or any of them, as to the ſaid Mayor Bailiffs and Burgeſſes for the Time being or the greater Part of them (whereof We will that the Mayor of the ſaid Burrough for the Time being be One) ſhall be thought fit neceſſary and requiſite to be done for the Obſervation of the ſame Laws Ordinances and Conſtitutions; And to levy and have the ſame Fines and Amerciaments, To the Uſe and Behoof of the aforeſaid Mayor Bailiffs and Burgeſſes of the ſaid Burrough and their Succeſſors, without Hindrance of Us our Heirs or Succeſſors, or any other Officers or Miniſters of Us our Heirs or Succeſſors, and without any Account therefore to be made to Us our Heirs or Succeſſors or Miniſters of Us our Heirs or Succeſſors: All and

Singular

* Singular which Laws Ordinances and Conſtitutions, to be made as aforeſaid, We will ſhall be obſerved, under the Pains therein to be contained; ſo always that the ſaid Laws Ordinances Inſtitutions Conſtitutions Impriſonments Fines and Amerciaments may be reaſonable, and not repugnant or contrary to the Laws Statutes Cuſtoms or Rights of our Kingdom of *England* or reaſonable and laudable Preſcriptions and Cuſtoms in the ſaid Burrough anciently uſed and accuſtomed. * P. 847.

There are alſo ſeveral other Clauſes contained in King *James*'s Charter, not pertinent to the preſent Queſtion.

On *Friday* 25th *May* laſt, Sir *Richard Lloyd*, Mr. *Gould*, Mr. *Yates*, and Mr. *Selwyn*, who were of Counſel for ſuperſeding the *Certiorari*, argued upon the three following Queſtions.

1ſt Queſtion—Whether *Berwick* is *Part of the Realm* of *England.*

2d Queſtion—Whether it is *governed by the Laws of England.*

3d Queſtion—Whether, ſuppoſing that it is, it would *follow*, " that a *Certiorari* lies."

Firſt—To prove that *Berwick* is *not* part of the *Territorial* Realm of *England*, they cited *Calvin*'s Caſe, (6 *Jac.* 1.) 7 *Rep.* 23. expreſs; and *Craw* v. *Ramſey*, *Vaughan* 278, 300. 2 *Vent.* 4. S. C. and *Carre*'s Caſe, cited in 3 *Leon.* 20. and the Statute of 21 *H.* 8. *c.* 6. concerning Mortuaries, (5 or 6 Years before the Incorporating *Wales* with *England*) §. 7. which ſhews the Senſe of the *Legiſlature*, " That " *Berwick and Calais* were *not* comprehended within the " Term *Realm* of *England.*" So alſo is 1 *Mod.* 37. *Criſp*'s *Caſe* v. *Mayor of Berwick*; and *Vaughan* 414. concerning Proceſs into *Wales.*

And *not being Part of the Realm of England*, it is * *not bound by Act Parliament, unleſs named*; For which Reaſon, in 1 *W. & M.* (the Act for encouraging the Exportation of Corn,) *Berwick* not being mentioned, a new Act was made, which named it expreſsly.

* *Sed V.* 26. *G.* 2. *c.* 42. § 3. which declares and enacts, "that in all Caſes where *England hath been* or ſhall be mentioned in any Act of Parliament, the ſame *has been* and ſhall be deemed to comprehend and include *Wales* and *Berwick.*"

Second Queſtion—The Charters could not make the Inhabitants of this *conquered* Place to be *Subjects* of *England*: And the Charter of *Ed.* 4. directs that they ſhall be governed by Laws received from *Alexander* King of *Scotland.* The Charter of 1 *Jac.* 1. (which was *confirmed by Act of Parliament*) eſtabliſhes their *old* Uſages; and gives them a Court of *Oyer and Terminer*, and a Court of Gaol-Delivery, with an *expreſs Excluſion* of all other Juriſdictions *out of* the Town of *Berwick*: But neither this Charter nor this Act of Parliament give them Title to the *Laws of England.*

* P. 848. * 21 *Ed.* 1. Parliament Roll—*Boyd* v. *Barnaby*, proves that they were governed by the Laws of *Scotland*. And it appears from 2 *Peere Wms.* 75, 76. * that the Laws of a conquered Country ſhall hold Place, till new Ones are given to them by the Conqueror. So alſo is 1 *Salk.* 411. *Blankard* v. *Galdy*. And if they are governed by their own Laws, it would be nugatory and fruitleſs, for this Court to iſſue a *Certiorari* to them.

*It is the 3d Reſolution of the Privy Council.

Third Queſtion—There is no Difference between *Berwick* and *Ireland*, as to *this* Point: And according to 2 *Ventr.* 7. A *Certiorari* will not lie to remove an Indictment from *Ireland*.

In *Vaughan* 403, 404. it appears that He was of Opinion "That the Alteration of the Juriſdiction in *Wales* might "moſt probably be wrought by an *Act of Parliament* not "now extant."

A *Certiorari* would not only create Delay; but would occaſion an inſuperable Difficulty of *Trial*: And it would be nugatory to grant One, where the Court cannot proceed upon it; as in Dr. *Sands*'s Caſe, 1 *Salk.* 145. where it was, for that very Reaſon, denied.

†*V.* 5, 6 *W. & M. c.* 11. 8, 9 *W.* 3. *c.* 33. (but they only relate to Quarter Seſſions.)

Now all indictable Offences are *local*: Therefore, they muſt be *tried* † *there*. And yet no Proceſs of this Court would *lie there*; nor could the Trial be in the *adjoining Engliſh* County, becauſe *Berwick* is no County in *England*, 2 *Shower* 365. Mayor of *Berwick*'s Caſe. The Caſe of *County-Bridges* is the only *criminal* Caſe, where the Trial may be in the adjoining County, upon Suggeſtion: For all the Precedents are of *civil* Caſes, and thoſe *tranſitory* too. *Salk.* 651. Title *Trial*, *pl.* 31. *Way* v. *Yally*. And there is *no Precedent* of any Cauſe removed from *Berwick* and finally determined here.

Mr. *Norton contra*—The General Queſtion is, "Whether "a *Certiorari* will lie to *Berwick*, to remove an Indictment "found at a General Gaol-Delivery there, for a Miſdemeanour."

The Caſe *now* under Conſideration requires it, *if any can*; ſince the Judge who is to try the Cauſe is both Party and Witneſs.

The Anſwer that has been inſiſted upon, is "that *Ber*"*wick* is an *exempt Juriſdiction*: and no *Certiorari* lies "thither."

Three Objections have been made to this *Certiorari*: (1ſt.) That *Berwick* is *not part of the Realm* of *England*; (2d.) If it is, yet 'tis *not governed by Engliſh Laws*; (3.) That if the Court *ſhould* grant the *Certiorari*, yet they can *not proceed* upon it.

I pre-

* I premiſe that this Court hath a *General Superviſion* of all inferior Juriſdictions in *England:* And, they may alſo grant *Certioraries, before* it appears whether they can proceed upon them or not. * P. 849.

Anſwer to 1ſt Objection—The Clauſe in 20 *G.* 2. *c.* 42. §. 3. proves clearly "that *Berwick is* part of the Realm of "*England.*"

The Argument alſo from their *ſending Members* to repreſent them in Parliament, is *irrefragable.* And *Prynne's Parliamentary Writs* prove that *Berwick* ſent Members, before the Time of *Ed.* 4.

This Court conſtantly ſends *Certioraries* to the *Cinque Ports.*

Anſwer to 2d Objection—Their Charter of 1 *Jac.* 1. *ties them down,* to proceed by the *Laws of England,* in *criminal* Matters. Conſequently, this Court will ſuperintend their Proceedings under their Charters. And their Acceptance of a Charter which ſubjects them to the Laws of *England,* renders them *liable* to this Superintendency.

The 3d Objection would come *more properly,* upon the *Return* of the *Certiorari:* The Writ ought to be obeyed, and a Return made.

Anſwer to 3d Objection—But however, from the *Neceſſity* of the Caſe, this Matter muſt be tried in the *adjoining County;* Like the Caſe of *Wales,* or of County-Bridges: Both of which are done by the Court's *General* Power, and to prevent Failure of Juſtice.

An Indictment is no more local than a *Real Action* is: And yet *theſe* are tried in *Northumberland.* And the Militia-Act conſiders *Berwick* as being in *Northumberland.*

Precedents too are not wanting. In 3 *Jac. B. R.* An *Information qui tam &c,* on the Statute of Uniformity, was brought up by *Certiorari;* And Proceſs iſſued. In *M.* 8 *Ann.* An *Information* in this Court was granted for an Offence in *Berwick;* and the Rule made abſolute. In 9 *G.* 1. *B. R.* there was a *Mandamus* to ſwear *Wilſon* and three Others Churchwardens of *Berwick.* And *Berwick* is put under the Eccleſiaſtical Juriſdiction of the * Dioceſe of *Durham,* by their Charter. In 1754, an Indictment againſt *Moſcroft* and two Others, for an Aſſault, was removed hither, from thence, by *Certiorari:* And they appeared and pleaded. In *H.* and *P.* 1755, in the Conteſt between Mr. *Wilkes* and Mr. *Watſon, Informations* for Bribery were granted: the Rules were made abſolute. * *V. poſt.* pa. 857.

The

* P. 850. * The Affidavits of the Facts being read, It appeared that the Indictment was for an Aſſault upon the *then Mayor*, who ſtill *continues a Juſtice of Peace* for the Burrough of *Berwick*.

Lord MANSFIELD ſaid, it would be proper to look into the Precedents that had been cited; and they would give their Opinion, next Term.

CURIA ADVISARE VULT.

Lord MANSFIELD now delivered the Opinion of the Court, to the following Effect.

The Objections and Arguments that have been urged againſt this *Certiorari* may be reduced to the following Heads—

1ſt. That this Court has *no Juriſdiction* over the Town and Burrough of *Berwick*, or any *local* Matters ariſing there; Becauſe it is not to be deemed Part of the *Realm* of *England*, and the King's Writ does *not run* there: Conſequently, this Court has no Authority to remove a Record from thence, by Writ of *Certiorari*, for any Purpoſe whatſoever.

2dly. That ſuppoſing the Court may, for *ſome* Purpoſes have Juriſdiction there, Yet the *End*, for which the *Certiorari* is deſired upon the *preſent* Occaſion, can *not be attained*.

3dly. That though the Court ſhould have Authority, and the End be attainable; Yet the *Ground*, upon which the *Certiorari* is applied for, is *not ſufficient*.

1ſt. Head. 1ſt. As to being Part of the Realm.

As to the firſt—The beſt Way of conſidering it, may be, conciſely to deduce the Condition and Conſtitution of *Berwick* contraſted with *Wales*; to ſhew that Arguments from the Caſe of *Wales* hold to *Berwick*, equally at leaſt, in all Reſpects; in many, *a fortiori*.

Edward the firſt conceived the great Deſign of *annexing* all other Parts of the Iſland of *Great Britain* to the Realm of *England*. The better to effectuate his Idea, as Time ſhould offer Occaſion; He maintained "that All the "Parts thereof, not in his own Hands or Poſſeſſion, were "HOLDEN OF HIS CROWN."

The Conſequence of this Doctrine was, that by the Feudal Law, ſupreme Juriſdiction reſulted to *Him*, in Right of his Crown, as Sovereign Lord, in many Caſes which He might lay hold of; And when the ſaid Territories ſhould come into his Hands and Poſſeſſion, they would come back

as

* *as Parcel* of the Realm of *England*, from which (by Fiction of Law at leaſt,) they had been originally ſevered. * P. 851.

This Doctrine was literally true, as to the Counties Palatine of *Cheſter* and *Durham*.

But, (no Matter upon what Foundation) He maintained that the *Principality of* WALES was holden of the Imperial Crown of *England:* He treated the Prince of *Wales* as a rebellious Vaſſal; ſubdued him; and took Poſſeſſion of the Principality. Whereupon, on the 4th of *December* in the 9th Year of his Reign, He iſſued a * Commiſſion to enquire "Per quas Conſuetudines Anteceſſores noſtri Reges regere *conſueverant* Principem "Walliæ et Barones Walenſes Walliæ et Pares ſuos et alios "inferiores et eorum Pares &c." * *Rotul' Walliæ*, 9 *Ed.* 1. *M.* 5. *Leges Walliæ, Hoëli Boni*, 518. (publiſhed) by *Wotton.*)

If the Principality was *feudatory*, the Concluſion neceſſarily followed, "That it was under the Government of "the *King's Laws*, and the *King's Courts*, in Caſes proper "for them to interpoſe;" though (like Counties Palatine) they had peculiar Laws and Cuſtoms, *Jura Regalia*, and complete Juriſdiction, at Home.

There was a *Writ* at the ſame Time iſſued to all his Officers in *Wales*, "to give Information to the Commiſſi-"oners:" And there were 14 Interrogatories ſpecifying the Points to be inquired into. The * Statute of *Rutland* refers to this Inquiry. By * that Statute, He does *not annex Wales* to *England*, but recites it as a *conſequence* of its coming into his Hands—"Divina Providentia Terram Walliæ, "PRIUS *nobis Jure feodali ſubjectam*, jam in Proprietatis "noſtræ Dominium convertit, et Coronæ Regni Angliæ, "*tanquam partem Corporis ejuſdem*, annexuit et univit." * 12 *Ed.* 1. See it in the 2d Vol. of the Book of Old Statutes, intitled "*Statuta Walliæ.*" See alſo in *Hale's Hiſt. of the Com-mon Law pa.* 183, 184. this Preamble to it; and likewiſe in *Vaughan* 400.

The 27 *H.* 8. *c.* 26. adheres to the ſame Plan, and recites "that WALES *ever hath been incorporated, annexed,* "*united, and ſubject to, and under the Imperial Crown of* "*this Realm*, as a very *Member*, and *Joint* of the ſame."

Edward the 1ſt having ſucceeded as to *Wales*, maintained likewiſe "that *Scotland* was holden of the Crown of *Eng-*"*land.*"

That Juriſdiction which reſulted to Him as ſuperior Lord, He often *exerciſed* as ſitting in *this* Court—* Upon a Complaint of a Burgeſs of *Berwick*, againſt his own Commiſſioners, whom He would not ſuffer to be tried in the Courts of the King of *Scotland*.—† Upon Complaint of a Merchant.—‖ Upon a Complaint of *Mc Duff*.—‡ Upon a Complaint of *Auſtria* claiming the *Iſle of Man*. * *Rymer*, 2 Vol. 596.

† *Rymer* 605.
‖ 21. *Ed.* 1. *Rymer* 606.
‡ *Rymer* 608.

* P. 852. * *Man.*—‖ Upon a Complaint of the Abbot of *Reading*—† Upon a Complaint of the Biſhop of *Durham* claiming the Town of *Berwick*, as belonging to his See. In the 24th Year of his Reign, he treated the King of *Scotland*, as a rebellious Vaſſal; and took *Berwick*, and the reſt of *Scotland*, into his own Hands and Poſſeſſion. And as this Court exerciſed that Juriſdiction which reſulted to the King, in the Capacity of *Superior Lord of Scotland*; *à fortiori*, it did ſo, when the Country came into the King's *Hands* and *Poſſeſſion*. Therefore the Court of King's Bench ‡ *actually* ſat at *Roxburgh in Scotland*.

‖ *Rymer*, 2 Vol. 615.

† 22 *Ed.* 1. *Rymer* 632.

‡ *Hale's Hiſt. Common Law*, *fo.* 201.

* While he continued in Poſſeſſion of *Scotland*, He granted a *Charter* to the Town and Burrough of *Berwick*, under the *Great Seal of* ENGLAND, (though He then had a Great Seal of *Scotland*.) The Charter requires the Mayor to be ſworn before His Chancellor or Treaſurer and Barons of His Exchequer in *Scotland*: And the Writ to chuſe a Coroner is to iſſue out of His Chancery in *Scotland*. He ſeems to conſider the whole Country as *united* into *one Realm*: for the Privileges are given "Per totum Regnum "et Poteſtatem noſtram in Terra et Poteſtate noſtra."

* 30 *Ed.* 1.

In a few Years, *Berwick* with the reſt of *Scotland* was loſt; and continued ſo, many Years.

† *Edward the* 3*d* renounced all Pretenſion to the Kingdom of *Scotland*, in Property, or Superiority, *diviſum à Regno Angliæ*.

† 2 *Ed.* 3. *Rymer* 4th Vol. 337.

‖ *Edward* the 3d procured from K. *Ed. Baliol*, and the Parliament of *Scotland*, a *Grant* and *Ceſſion* of BERWICK, *ſeparate from Scotland*, "for ever," "et regali Dignitati et "*Coronæ ac Regno Angliæ* perpetuis temporibus *annexa*, "*unita*, *et incorporata*." In the 10th Year of his Reign, He granted to *Berwick* an Exemplification and Confirmation of the Charter of *Ed.* 1ſt.

‖ 6, 7, 8 *Ed.* 3. *Rymer*, Vol. 4. *pa.* 536. 590. 595. 614.

BERWICK was *again loſt*, when *Edward* the 3d was in *France*; and retaken after His Return: And, in the 30th Year of his Reign, He gave a *new Charter*, confirming the former, with ſome *Additions*; particularly, that they ſhould be governed by the Laws and Uſages, which they enjoyed in the Time of *Alexander* late King of *Scotland*; (who reigned before the Competition about that Crown.)

Berwick was loſt again; and again recovered by *Edward the 4th* who *confirmed* the former Charters, by a * Charter and † Act of Parliament.

* 22 *Ed.* 4. † 22 *Ed.* 4. *c.* 8.

Between this Time and the 33d of *Hen.* 8th. (the particular Time does not appear, becauſe the Returns are loſt,)

Berwick

* *Berwick* was ſummoned, as a Burrough of *England*, to ſend *Members* to *Parliament*: And they did ſo, till the Union: and they ſtill continue to ſend Members to the Parliament of *Great Britain*, by Summons, as being Parcel of the Realm, not under any of their Charters, none of which give them ſuch a Right. That of *E.* 4, is an Inſpeximus of the preceding Ones: And the Charters of 19 *April*, 1 *H.* 8. 25 *April*, 1 Qu. *Mary*, 4 *May*, 1 Qu. *Eliz.* are Confirmatory Charters only. None of them give them a Right to ſend Members to Parliament: and yet they have ſent them, ever ſince King *Henry* the 8th's Time. * P. 853.

Their preſent Conſtitution is under Letters Patent granted in * 2 *Jac.* 1. Which are expreſsly confirmed by † Act of Parliament. Under *theſe*, they act: And they have had no Charter ſince.

* 20th *April* 2 *J.* 1.
† 2. *J.* 1. *c.* 28. (called, in *Hawkins*'s Edition, 1. *J.* 1. *c.* 28.)

Before the UNION, *Berwick* was *bound* by every *Engliſh general Act of Parliament*, in like manner as *Wales* was bound: And that was as being *Part of the Realm* of *England*. Where it is particularly named in Acts of Parliament, that is *ſuperfluous*: And ſo alſo is the Naming of *Wales*. *If* it was not Part of *England* before the Union, it is now no Part of *Great Britain*: for only *England* and *Scotland* are united. It is *bound* by all *General* Laws ſince the Union.

In *General* Acts, not applicable to *Scotland*, and where *Scotland* is not intended to be included, the Method is, by Proviſion, To declare "it does *not extend to Scotland*." Where Proviſions are made for that Part of *Great Britain* called ENGLAND, *Wales* and *Berwick upon Tweed* are *comprehended* under that Deſcription.

WALES, from the Time it came into the Hand of *Ed.* the 1ſt. was deemed to be within the Realm, upon the Doctrine of having been *holden before of his Crown*: And in Conſequence of ſuch Tenure, by Deductions from the Principles of the Common Law, this Court exerciſes *Juriſdiction* over Matters in *Wales* given *by* NO *Act of Parliament*; (For the ‖ Notion of "ſome Old Statute that has "been loſt," depends only upon a looſe ‡ imperfect Note of Ld. Ch. J. *Vaughan*'s.)

‖ *V. Vaughan* 403, 404.
‡ *V. Vaughan* 395. the Memorandum in the Margin.

SCOTLAND was conſidered upon the *ſame* Foot—*This* Court exerciſed the ſovereign Juriſdiction over it, *before* it came into the King's Hands; and *afterwards*, at the Time when the firſt Charter was granted to *Berwick*. The Chance of War refuted the Claim of the *Reſt* of *Scotland*, as belonging to *England*; and confirmed it, as to *Berwick*.

BUT,

* P. 854. * But, if *Berwick* was to be deemed a *Dominion of the Crown*, and *no* Part of the Realm of *England*; It may be under the *Control* and *Superintendence* of the King in this Court.

The *Conſtitution* given to *Berwick* by the Crown of *England*, approved by Parliament, ſhews it neceſſarily is ſo; much ſtronger than in the Caſe of *Counties Palatine*, or *Wales*. The People of *Berwick* have not *Jura Regalia*, or a *complete Juriſdiction* within themſelves, like a *County Palatine*: They have no *Sovereign Courts* of the King within themſelves, like *Wales*. They are made a *free Burrough*, to hold in *Burgage*, by *Rent*. Such a Creature of Law muſt neceſſarily be connected, as *Part* of a Kingdom, and *ſubordinate*.

In the Time of King *Alexander*, they were ſubject to the Supreme Courts of *Scotland*. They could have no Laws or Cuſtoms but ſuch as were ſuitable to the *ſubordinate* Condition of a *Burrough*.

The Metamorphoſis from a *Scotch* to an *Engliſh* Burrough did *not* make them *independant*; but *only changed* the Sovereign Juriſdiction. They are made a *Corporation in England*; to ſue or be ſued, in that Capacity, *in England*; to take Lands, in that Capacity, in *England*. The Burgeſſes, in *that* Capacity are to enjoy many Privileges in *England*: They ſend *Repreſentatives to Parliament*, by Summons, *as a Burrough in England*.

This Court alone can judge of their Franchiſes, as a *Corporation*; and *Who* are intitled as *Members* of it; and what are their Privileges; and whether they continue to exiſt, or not: As, if you ſuppoſe a Queſtion to ariſe "Whether "they are *diſſolved*;" or, "*Who* is *Mayor &c*," Who can judge, but this Court? The Charter of *James* the 1ſt *ſuppoſes* it: Becauſe He commands the Attorney and Solicitor General to bring *no Writ of Quo Warranto* for Things *paſt*. In *Hilary* Term 14, 15 *Car.* 2. A *Quo Warranto* was brought in this Court, againſt the Mayor Bailiffs and Burgeſſes of *Berwick*; but not proceeded in.

Another Part of their Conſtitution, more immediately applicable to the preſent Queſtion, is What relates to *Pleas of the Crown*.

The Charter grants them a Court Leet *agreeable to the Laws and Statutes of England*; A Commiſſion of Peace and *Oyer and Terminer*, with the *ſame* Authority *which belongs, or hereafter may belong to Juſtices of the Peace in England*; and to hear and determine in *like* Manner *as Juſtices of Peace, by the Laws and Statutes of England*. It grants them a Commiſſion of Gaol-Delivery, under which they muſt proceed by *Indictment*, according to the Courſe of the *Law of England*; as in Fact, they always do, and have done

* done in the preſent Caſe. It grants a Gallows to execute thoſe adjudged to Death, *according to the Law of England.* * P. 855.

The Charter gives them Power to make Ordinances with Penalties of Fine and Impriſonment; *ſo as they be reaſonable, and not repugnant to the Laws, Statutes and Cuſtoms of England.* In ſhort, They have no CRIMINAL *Law, but* the Law of ENGLAND; and *no* CRIMINAL *Juriſdiction, but* with ſuch a *Reference* to the Law of ENGLAND, as *neceſſarily includes this Court.*

Suppoſe They ſhould adjudge a Man to *Death*, for a Crime *not capital* by the Law of *England*;—Suppoſe they *indict* a Man for *diſobeying* an Ordinance *repugnant* to the Law of *England*;—Suppoſe they ſhould indict a Man *for Treaſon*, though the Fact would not amount to Treaſon within *our* Laws;—Suppoſe, as Juſtices of the Peace, they make *illegal Orders* without any Authority, in a ſummary Way; There can be *no Redreſs* BUT HERE: And if this Court could not interpoſe, they would, under the Grant of a *limited ſubordinate* Authority, be *abſolute.*

Another Objection is "The King's Writ does *not run* "there." 2d Diviſion of the 1ſt Head.

That is applicable only to the Writ of *Venire*, and other *Jury-Proceſs*; or perhaps, to *Original* Writs which are the Commencement of Suits between *Party* and *Party.*

When this Court removes, by Writ of *Certiorari*, an *Indictment* for a Miſdemeanour, from WALES, the *Welſh* Sheriff is commanded to cauſe the Defendant to appear: And When He has appeared, and Iſſue is joined, there is a Suggeſtion "That the King's Writ does *not* run into *Wales.*" So, the *very Record* which ſays "the King's Writ does not "run," ſhews many that *do.*

The Reaſon why a *Venire* does not run to *Berwick*, is, becauſe they are exempted from being ſummoned *out* of the Burrough, to ſerve upon Juries.

But the Charter ſuppoſes That *other* Writs, miniſterially directed *may* run: Becauſe the *Return of* ALL *Writs Precepts and Proceſs iſſuing out of the King's Courts, and the Execution thereof, is granted to the Mayor Bailiffs and Burgeſſes, excluſive of any Sheriff, Miniſter, or Bailiffs.*

Writs, *not miniſterially* directed, (ſometimes called *Prerogative* Writs, becauſe they are ſuppoſed to iſſue on the Part of the King,) ſuch as Writs of *Mandamus, Prohibition, Habeas Corpus, Certiorari*, are reſtrained by no Clauſe in the Conſtitution

* P. 856. Conſtitution given to *Berwick*: Upon a proper Caſe, *they* may iſſue to *every Dominion of the Crown of England.*

There is no Doubt as to the POWER of this Court, where the Place is under the Subjection of the Crown of *England*: The only Queſtion is, As to the PROPRIETY.

To FOREIGN Dominions, which belong to a Prince who ſucceeds to the Throne of *England*, this Court has *no Power* to ſend *any* Writ of *any* Kind. We cannot ſend a *Habeas Corpus* to *Scotland*, or to the *Electorate*: But to *Ireland*, the *Iſle of Man*, the *Plantations*, and, (as ſince the Loſs of the Dutchy of *Normandy*, they have been conſidered as annexed to the Crown, * in ſome Reſpects,) to *Guernſey* and *Jerſey*, We *may*; And Formerly, it lay to *Calais*; which was a Conqueſt, and yielded to the Crown of *England* by the Treaty of *Bretigny*.

V. Hale's Hiſt Com. Law 184 to 189.

But, *notwithſtanding the* POWER which the Court have, Yet where they cannot *judge* of the Cauſe, or give *Relief* upon it, they would not think PROPER to interpoſe. Therefore upon Impriſonments in *Guernſey* and *Jerſey*, in *Minorca*, and in the *Plantations*, I have known Complaints to the *King* in *Council*, and *Orders* to bail or diſcharge: But I do *not* remember an Application for a Writ of *Habeas Corpus*. Yet Caſes have formerly happened of Perſons illegally ſent from hence and detained there, where a Writ of *Habeas Corpus* out of this Court would be the *propereſt* and *moſt effectual* Remedy.

In *Cro. Jac.* 543. a Precedent is cited, in 43 *Eliz.* of a * *Habeas Corpus* to *Berwick*. I have cauſed the Records to be ſearched for that Caſe: And the Orders of the Court, and Return to the Writ of *Habeas Corpus* are found. The Court had fined the Mayor and Bailiffs of *Berwick* 2000 *l.* for not returning the † Writ: They had alſo iſſued an *alias Habeas Corpus*. || Then, the *Alias Habeas Corpus* not being returned, they ordered the Fine to be eſtreated; and that a *Pluries Habeas Corpus* ſhould iſſue, *Sub pœna* 500 *Merc'*, returnable immediately before the Chief Juſtice at his Chambers in *Serjeants Inn*. At the ſame Time, they iſſued an *alias* Attachment againſt the Mayor and Bailiffs; and ordered Ld. *Willoughby*, then Governour of the Town of *Berwick*, to execute it, returnable *Octabis Hilarii*. The ‡ next Day, the Eſtreat of the Fine was ſuſpended, upon *Henry Brearly*'s being diſcharged out of Priſon, and bailed to appear in this Court, at the Octave of S. *Hilary*, (the Return of the Attachment againſt the Mayor and Bailiffs.)

* For one *Browley*, as He is there called.

† *M.* 43 *Eliz. Hab. Cor.* for *Henry Brearley*, *V. H.* 43 *Eliz. Rot'lo* 88.

|| *Die Jovis prox' poſt* 15. *Sancti Martini.*

‡ The former was *die Jovis*; the latter, *die Veneris prox' poſt quinden' Sancti Martini A°* 43 *Eliz.*

In

* In *Hilary* Term, they are * ordered to return the *Pluries Habeas Corpus:* And afterwards, the Mayor and Two of the Bailiffs were committed, and examined upon Interrogatories, as in Contempt; and Two of them were † Ordered to find Bail at the Suit of *Henry Brearly*, before they were diſcharged.

* P. 857.
* *Die Ven' prox' poſt Octab' Sancti Hil. anno ſupradicto.*
† *Die Sab'ti prox' poſt Oct. Sancti Hil. Ao 43 ſupra dicto.*

The Return ſtates the Charter of *Ed.* 3d. and that by their Laws and Cuſtoms, the Guild had Authority to puniſh for colouring Foreigners Goods, or being in Partnerſhip with a Foreigner, by Fine, Impriſonment and Diſfranchiſing. They ſtate that *Henry Brearly* was found guilty of being in Partnerſhip with a Foreigner, and fined 100*l.* which He not only refuſed to pay, but treated them with ſcandalous and contumelious Reproaches. That they duly committed him to Priſon, till the Fine ſhould be paid; and diſfranchiſed him.

There is an Order, the || ſame *Hilary* Term, ſtated to be upon the Recommendation of the Court, (therefore I ſuppoſe, by *Conſent,*) "That the Fine of 100*l.* ſet upon *Brearly* by "the Guild, ſhould be reduced to 50*l*; and that upon his "Submiſſion, He ſhould be reſtored to his Freedom:" (But He was to remain diſfranchiſed till he ſhould make his Submiſſion.)

|| *Die Jovis prox' poſt Octab' Pur'*

As to the *other* Prerogative Writ, of *Prohibition*—It was *taken for granted*, in 2 *Ro. Abr.* 292. "That a Prohibition "*lay*, out of this Court to the conſiſtory Court of *Durham*, "in a Matter ariſing in *Berwick:* Though the Suggeſtion "that the Land out of which the Tithes were claimed lay "in *Scotland* and not in *Berwick*," was holden inſufficient. (How *Berwick* * *came* to be part of the Dioceſe of *Durham*, I have not learned.)

Tit. *Prohibition*, Letter L. *pl.* 6. *Tr.* 11 *C.* 2. between *Morton* and *Roſden.*
* *V. ante*, 849.

Then, as to Writs of *Mandamus*—In *Trin.* 9 *G.* 1. A *Mandamus* iſſued, directed to Sir *Geo. Wheeler*, to admit and ſwear four Perſons elected to be Church-Wardens of *Berwick.*

The Act of 11 *G.* 1. *c.* 4. proceeds upon the Ground "That a Writ of *Mandamus*, out of this Court, lies to "*Berwick.*"

The laſt Sort of Writ not miniſterially directed, is a *Certiorari.*

A *Certiorari*, for a proper Purpoſe, lies to ANY *Dominion of the Crown of England.* Mr. Juſtice *Dodderidge*, in † Sir *John Carew's* Caſe, ſays "the Regiſter makes mention of a "*Certiorari* to remove a Record taken at *Calais.*"

† *V. Cro. Jac.* 484.

And there are Precedents of *Certioraries* to *Berwick*, directly.

* P. 858. * In *Paſch.* 3 *Jac.* 2. An Indictment againſt *Scott*, *Howletſon* and *Watſon*, for a Riot &c, was removed from *Berwick*, by *Certiorari:* Proceſs iſſued upon it, out of this Court againſt the Defendants, to appear. In *Michaelmas* Term following, the Indictment was quaſhed; and the Town-Clerk of *Berwick* amerced 5*l.* for not returning the Caption.

In *Trinity* Vacation 1754, Two Indictments were removed from *Berwick*, by *Certiorari*: The Defendants appeared in this Court, and pleaded Not Guilty.

There is *no Inſtance* of a *Doubt* ever having been made, before the preſent Caſe, concerning the AUTHORITY *of this Court*, to ſend a Writ of *Certiorari* to *Berwick*. And We are All clearly of Opinion, "That the Court, by Law, "*has* ſuch POWER."

Two great Authorities are indeed urged, in *Oppoſition* to this: They are no leſs than thoſe of Ld. Ch. Juſtice *Coke* and Ld. Ch. Juſtice *Hale*.

*7 *Co.* 23. *b.* Lord *Coke*, in * *Calvin*'s Caſe, ſays "That *Berwick* is *no* "*Part* of *England* nor governed by the *Laws* of *England*."

† *Hale's Hiſt. Common Law of England, pa.* 184. *V. Rot. Parl.* 16 *R.* 2. *n.* 41, 42. And Ld. Ch. Juſtice *Hale* follows Him, and † ſays "*Ber*- "*wick* was ſometimes Parcel of *Scotland*; but was won by "Conqueſt by King *Edward* the 1ſt. And after that loſt by "King *Edward* the 2d, and afterwards regained by *Edward* "the 3d. It was governed by the *Laws* of *Scotland*, and "their *own particular Cuſtoms*; and *not* according to the "Rules of the Law of *England*, further than as by Cuſtom "it is there admitted." "Yet *now*," ſays He, "by CHAR- "TER, they ſend Burgeſſes to the Parliament of *England*."

In *Calvin*'s Caſe, there was *no Queſtion* concerning the *Conſtitution* of BERWICK. And we plainly ſee, by what has paſſed in the preſent Caſe, *how little was known*, even *at Berwick* itſelf, concerning its own Conſtitution. What was dropped about it, in *Calvin*'s Caſe, was a mere *Obiter* Opinion, thrown out by way of Argument and Example. My Lord *Coke* was very fond of multiplying Precedents and Authorities; and, in order to illuſtrate his Subject, was apt, beſides ſuch Authorities as were ſtrictly applicable, to cite other Caſes which were not applicable to the particular Queſtion under his judicial Conſideration. In the Caſe then under judicial Conſideration, the Queſtion was ‡ "Whether "*Robert Calvin* the Plaintiff, born *in Scotland* after the De- "ſcent of the Crown of *England* to King *James* the firſt, "was an *Alien born*, and conſequently diſabled to bring any "Real or Perſonal Action for any Lands within the Realm "of *England*." But it never was a Doubt "Whether a "Perſon

‡ *Calvin's Caſe, fo.* 2. *a.*

" * Perſon born in the *conquered Dominions* of a Country is " ſubject to the King of the *Conquering* Country." And therefore the Argument did not hold, from the Caſe of *Berwick* to the Point then in Queſtion: Neither was the Caſe of * *Calais* in any ſort appoſite in it. * P. 859. *V. Calvin's* Caſe. 22. a.

As to the *Laws* by which *Berwick* is governed—

Whatever may be the Caſe (when more particularly inquired into) with regard to their † *Civil* Conſtitution, It appears very ſufficiently, That in *Pleas of the* CROWN, *Berwick* has *no other* Laws by which it is governed, *but the* Laws of ENGLAND. The Statute of 11 *G.* 2. *c.* 19. for the more effectual ſecuring the Payment of Rents and preventing Frauds by Tenants, ſuppoſes this. All the Proviſions of that Act are extended to *Berwick*, ‖ by Name. Some of theſe Proviſions relate to ‡ *Ejectments*, which concern *civil* Matters: And they *do* proceed there, by *Ejectment*. But it is manifeſt, that Lord *Coke* is miſtaken in ſaying, generally, " That *Berwick* was *not governed by the Laws of* " *England*." For, in *Criminal* Matters, the Fact is clearly otherwiſe. † *V. Fitzherbert's Abridgment*, Title *Obligation*, *pl.* 15. ‖ § 1, 11. ‡ § 12, 13.

And Ld. Ch. J. *Hale* is as clearly miſtaken, in ſaying, " that *Berwick* ſends Members to the Parliament of *England*, " *by* CHARTER." For 'tis by *Writ* of Summons that they ſend them thither in *Conſequence* of their being a Burrough. *Cheſter*, both County and City, firſt ſent Members to Parliament, by virtue of an Act of Parliament § made in *H.* the 8th's Time. § 34 *H.* 8. *c.* 13.

BUT though the Court has *Power*, by Law, to ſend a Writ of *Certiorari* to *Berwick*, yet it ought not to iſſue *in vain*. And therefore We ſhould be ſatisfied, that the *End* for which it is prayed be *attainable*; and the *Ground ſufficient* for removing the Record, in Order to attain that End. The *End* here avowed is, that the Matter may be *tried in this Court*. And it is objected that there can be no ſuch Trial, becauſe the Trial muſt be *local*, and *no Jury* can come from *Berwick*. Second Head. Objection.

BUT the Law is clear and uniform, as far back as it can be traced. Where the Court has Juriſdiction of the Matter; if, from any Cauſe, it cannot be tried *in* the Place, it ſhall be tried as *near* as may be. All local Matters ariſing *in Wales*, triable in this Court, are by the * *Common Law* tried by a Jury of the *next* County in *England*. So, as to the † *Cinque Ports*, the *Venire facias* ſhall be awarded *de vicineto* of the next Vill, either in the County of *Kent* or the County of *Suſſex*. So ‖ it is alſo as to the Iſle of *Ely*: So, ‡ likewiſe as to *Ireland*; A *Venire* was directed to the Sheriff of *Salop*, as the next *Engliſh* County. So, in Parts of *England* itſelf where an impartial Trial cannot be had in the proper Anſwer. * 19 *H.* 6 *fo.* 12 *b. pl.* 31. † 2 *Ro. Abr.* Tit. *Trial*, Letter I. *pl.* 6, 7. *pa.* 596, 597. ‖ *Howſe* v. *Biſhop of Ely* —*Moore* 88. ‡ 2 *Ro. Abr.* 597. *pl.* 8.

* P. 860. * County, it ſhall be tried in the next. As 5 *G.* 1. *Rex* v. *Inhabitants of the County of the City of Norwich*, about a County Bridge, the Trial was in *Suffolk*.

This is the ancient and general Rule, wherever the Court has Juriſdiction: And this General Rule has *often* been *applied to* BERWICK.

21 *Ed.* 1. *Ryley's Placita Parl.* 459.

Edward the Firſt, by an Ordinance in Parliament, extended theſe Rules as to Complaints againſt the King of *Scotland*, that they might be tried in this Court by a Jury of *Northumberland*, or *any other* County, or before *Commiſſioners* appointed by the King. There was a Precedent applying this Rule to *Berwick*, in 42 *Eliz.* affirmed upon a Writ of Error: And the like in 44 *Eliz.* The like, the * 20 *Car.* 2. *Criſpe and Jackſon* v. *Mayor and Burgeſſes of Berwick.* And the Mayor of *Berwick*'s Caſe, † 36 *C.* 2. lays down as a certain Principle, That where a *local* Matter ariſing at *Berwick* is tried here, there is to be a Suggeſtion made on the Roll, that "Breve Domini Regis ibi non currit," as it is in *Wales*. A Tip ſtaff was in that Caſe ſent, to take the Mayor up.

* 1 *Lev* 252. 1 *Mod.* 36, 37. 1 *Sid.* 381, 462. 1 *Ventr.* 58. 90. *Raym.* 173. 1 *Keb.* 414, 676.

† 2 *Shower* 365.

There are two Precedents in the Reign of *Ja.* 2. of *Informations in this Court, for Miſdemeanours in Berwick*: And in *Michaelmas* 8 *Ann.* the ‖ Attorney General filed an *Information here, for Miſdemeanours* in *Berwick*. In *Hilary* and *Eaſter* 1755, This Court after much Litigation, granted *Informations for* ‡ *Bribery* in *Berwick*, at the Election of their Members to Parliament, as being an Offence and Miſdemeanour at the *Common* Law: Which ſhews *Berwick* in reſpect of the Juriſdiction of this Court "to proceed originally by In- "formation for *Miſdemeanours* committed there," to be upon the *ſame* Foot, as any *other* Part of *England*. And the Court never would have granted thoſe Informations, without being ſatisfied "that they might be *tried*:" Becauſe a Defect of Power to try, neceſſarily infers a Want of Juriſdiction.

‖ Sir *James Montagu*. It was againſt *Robert Mills* and *George Lindſay*.

‡ *V. ante*, 849.

There is not One *Authority* to the contrary. And in *Reaſon*, it would be moſt abſurd: Becauſe it would really be putting the Place out of the Protection of the Law; And there muſt, in many important Caſes, be a total Failure of Trial, and conſequently, of Juſtice.

Suppoſe the *Office of Mayor* ſhould be *uſurped*: The Uſurpation is a *Crime*; and cannot be tried before the Man *Himſelf* who is accuſed, or any Juriſdiction in the Town. Much leſs could a Queſtion, "Whether the *Corporation* was *diſ-* "*ſolved*," be tried before *themſelves*. Such Queſtions could not be tried originally before *Commiſſioners* ſent thither by the King:

* King: They could ONLY be judged in this Court. To try Franchiſes of this kind in any *other* ſhape, would not only be contrary to the Common Law, but to the * Act aboliſhing the Star-Chamber, and all the Statutes there recited. * P. 861. *16, 17 C. 1. c. 10.

Suppoſe an Action between the Corporation and their own Leſſee to be depending at *Berwick*, or any Suit inſtituted there between the Corporation and any other Perſon, on a Point of Property; They could not judge their *own* Cauſe: And *if* it could not be tried elſewhere, there muſt be a Failure of Juſtice.

Every Rule of the Common Law, which holds in the Caſe of *Wales*, concludes *à fortiori* to *Berwick*; both as to the Juriſdiction of this Court, and the Method of Trial. *Berwick* is only a Burrough; It has neither *Jura Regalia* nor *Superior Courts: Wales* had *Both*. A Small Part of the County of *Durham* is nearer to *Berwick* than *Northumberland* is: But at the Time of firſt ſending Proceſs to the latter, the King's Writ did not run to the former, being a County Palatine. So that *Northumberland* was the neareſt *Engliſh* County, for the Purpoſe of Trial; as the King's Writ did not run to *Durham*.

† The Objection made when this Matter firſt came on, appears now to be groundleſs; "That they proceeded by "Laws and Uſages, of which this Court *cannot judge*." Whereas, their Trials, as to *Criminal* Matters at leaſt, are in the Courſe of the *Common* Law, and entirely governed by the Laws of *England*. †*V. ante, pa.* 835, 836.

Therefore We are All of Opinion That theſe *Indictments* may be tried in *this* Court, by a Jury of the County of *Northumberland*.

The 3d Objection urged againſt the *Certiorari*, was, That though it ſhould be admitted "that the Court have Au- "thority to iſſue it, and that the End is attainable," yet there is *not* GROUND *ſufficient* to the Trial from the ordinary local Juriſdiction of *Berwick*. Third Head.

Moſt certainly, The Court ought to be *ſatisfied of the Ground*, before they ſend a *Certiorari* for that Purpoſe. The * *King* has a Right to chooſe his Court: But upon the Application of the *Defendant*, there ſhould be always a *Reaſon*. * The higher the inferior Juriſdiction is, and the greater the Inconveniencies are of removing the Cauſe, the ſtronger the Reaſon ſhould be: But a *Doubt*, "Whether "a fair, impartial, or ſatisfactory Trial or Judgment can be "had there," is *a Reaſon* to remove from the *higheſt*. * *V. Rex* v. *Inhabitants of* Clare, *Tr.* 1769. *B. R.*

In the Caſe † of *Rex* v. *Lewis*, *Tr.* 12 *G.* 1. after conſidering the Matter at different Times, and looking into Precedents; and there being an Affidavit produced, inducing, a † 1 *Strange* 704.

Suſpicion

* P. 862. * *Suſpicion* " that a fair Trial could not be had in *Wales*;" —A *Certiorari* was granted to remove the Indictment from the grand Seſſions of *Angleſea*. This *Suſpicion* only, being properly verified by Affidavit, was in that Caſe holden to be a ſufficient Reaſon for Removing that Indictment from a very high Court.

Let Us inquire into the Reaſon alledged in the Caſe now before Us, " Why there can't be a fair Trial *in Berwick*."

The Defendant in *this* Caſe ſwears to his Innocence: And He and Five more ſwear " That he *cannot have a fair* " *Trial*, owing to Party Differences, and great Contentions " that have lately happened in the Burrough. That the " *Juſtices*, *before whom He is to be tried*, warmly ſupported " a Motion to diſfranchiſe Him *for the Offence* laid in this " Indictment: Which was rejected by a great Majority of " the Burgeſſes. That the *Matter of Indictment* aroſe at " an Aſſembly of the Corporation, in Conſequence of a " *violent Diviſion* which engaged the *whole Body*."

I ſuppoſe the Magiſtrates of *Berwick* may be in the Right, and Men of the greateſt Integrity: But they *admit* a great Contention in the Burrough; That the Matter laid in the Indictment *aroſe* from a warm Diſpute at the Guild, upon a Point of Buſineſs, which produced a Riot and Tumult, that broke up the Guild in great Confuſion; That the *Juſtices are All of one Side*, upon this Point.

It is not denied that the *Juſtices vehemently preſſed a Motion to Diſfranchiſe* the Defendant *for the Offence charged in this Indictment*; which was rejected by a great Majority of Burgeſſes. Whether the *Motive* for rejecting it, was becauſe they thought the Defendant innocent, or becauſe they thought the Motion premature and too violent, is immaterial.

Robert Selly's Affidavit againſt the *Certiorari*, ſhews it is conſidered as a Cauſe *againſt the Magiſtrates*, and that his Brother———who made an Affidavit for the Defendant, liſted as a Soldier on *that* Account, and declared he had rather go to the fartheſt Part of the World, than *fly in the Face of a Magiſtrate*.

Upon *this* Occaſion; *All the Juſtices oppoſe the Certiorari*, and have produced Affidavits to prove the Defendants *Guilty*.—They *may* be ſo: And *if* they are, they ought to be ſeverely puniſhed. But it is impoſſible, that *under all theſe Circumſtances*, the Trial or Judgment at *Berwick* ſhould be *ſatisfactory*.

Every Body in the Town has already *pre-engaged his Opinion*. The *Burgeſſes* have all taken Sides: The *Juſtices* have already

* already *declared* him ſo *heinouſly guilty*, that he ought to be immediately diſfranchiſed, without waiting for a Trial of the Indictment. I dare ſay they were of that Opinion, without Prejudice to the Man, but from Indignation at his Guilt: And perhaps very juſtly; For a Man *may* judge impartially even in his own Cauſe. However, *We* muſt go upon *general* Principles. If a *Witneſs* in a Cauſe has an *Intereſt*, though it be ſmall, He muſt be rejected: Or if a *Juryman* has declared his opinion by a former Verdict, He may have done it very juſtly, but yet is liable to be challenged for this Cauſe, on a ſubſequent Trial. In the preſent Caſe, it is impoſſible but that All the Perſons who would be concerned in trying this Matter at *Berwick*, muſt be *biaſſed* by their *preconceived Opinions*. I don't ſpeak this, with the leaſt *Imputation* upon the Magiſtrates of *Berwick*: But it is not fit that they ſhould be Judges in their *own* Cauſe, and after having *already gone ſo far* as they have done. * P. 863.

Therefore We are, All of Us, of Opinion That the Rule to ſhew Cauſe "Why Writs of SUPERSEDEAS to theſe "Writs of *Certiorari* ſhould not iſſue," ought to be diſcharged.

But *unleſs* the Matter could have been *tried here*, A *Certiorari ought not to have gone*: Nor ſhall it now be uſed for *Delay*. To prevent which, the Proſecutors of the *Certiorari* ſhall engage to appear, and take ſhort Notice of Trial, and try it at the next Aſſizes for the County of *Northumberland*.

I have ſettled the form of a SUGGESTION to be entered upon the Roll: Which I will give to the Maſter of the Crown-Office for that Purpoſe.

His LORDSHIP accordingly did ſo: And

It was as follows—"And becauſe the Burrough of *Berwick* is a Place where the King's Writ of *Venire facias*, "to ſummon a Jury to try the ſaid Iſſue, doth not run; "And becauſe the Burgeſſes of the ſaid Burrough, by reaſon of their Privileges, ought not to be put upon any "Jury to try the ſaid Iſſue out of the ſaid Burrough; "but the ſaid Iſſue ought to be tried by a Jury of the "County of *Northumberland*, which is the next adjacent "County to the ſaid Burrough of *Berwick*; which Allegations of the ſaid *Henry Cowle* are not denied by the ſaid "*James Burrow* Eſq; Therefore it is commanded the "Sheriff of *Northumberland*, that He * cauſe to come &c." * The Entry upon the Record has a Clauſe of *Non omittas*, (which is always inſerted on the Crown-Side:) *viz.* "that he do not forbear, by reaſon of any Liberty in his Bailiwick, but that "he cauſe to come, &c.

The

*P. 864. * The RULE now made by the Court (in Conſequence of their preſent Reſolution) was afterwards drawn up and entered in theſe Words, *viz.*

Upon mature Deliberation had here in Court, *It is Ordered* by this Court, That the Rule made "that the Defendants ſhould ſhew Cauſe why a Writ of SUPERSEDEAS ſhould not iſſue to the two Writs of *Certiorari* lately iſſued out of this Court, to remove "all and ſingular Indictments againſt the Defendants," be DISCHARGED,

And the ſaid two Writs of *Certiorari* and the Returns thereto being now *returned* and *filed* in this Court, *It is further Ordered* that the ſaid Defendants do *immediately appear and plead* to the ſaid Indictments; and *proceed to the Trial* of the ſaid Indictments, at the *next* Aſſizes to be holden in and for the County of *Northumberland*. *And it is further Ordered* that in Caſe the *Defendants* ſhall make Default or neglect to make up the Records and proceed to the Trial of the ſaid Indictments, at the now next Aſſizes to be holden in and for the County of *Northumberland*, in ſuch Caſe, the *Proſecutors* ſhall be at Liberty to make up the ſaid Records, and proceed to the Trial of the ſame, at the ſaid next Aſſizes in and for the County of *Northumberland*.

And as to the Application for an ATTACHMENT, for *not returning* the ſaid two Writs of *Certiorari*,

It was *Ordered* That the Rule made, "that *Henry* "*Hodgſon*, *William Compton*, *Fenwick Stow*, *William* "*Temple*, and *Samuel Burn* Eſquires ſhould ſhew "Cauſe why a Writ of Attachment ſhould not "iſſue againſt them, for their *Contempt*," be DISCHARGED.

The Indictment was afterwards tried at *Newcaſtle*.

Wedneſday 4th July 1759.

Rex *verſ.* Bootie.

ON *Tueſday* 19th *June* laſt, Mr. *Aſhurſt* moved in Arreſt of Judgment, after Verdict for the King, upon an Indictment againſt a Conſtable, for a Miſdemeanor.

The Charge in the Indictment was, That He, being One of the Conſtables of *St. Martin's in the Fields*, and being in the Execution of his ſaid Office, as Head of the Nightly

* Nightly Watch of the ſaid Pariſh, did wilfully and unlawfully ſuffer *Margaret Prince*, *being* a looſe idle lewd and diſorderly Perſon, taken up by *Robert Miller*, One of the Nightly Watch of the ſame Pariſh, between 1 and 2 o'Clock in the Morning, as a Common Street Walker &c, *to eſcape* out of his Cuſtody, before She could be carried before a Juſtice of the Peace, to be dealt with by the Juſtice according to Law. *P. 865.

The whole Indictment was (in Subſtance) thus—That One *Robert Miller*, being lawfully appointed one of the Nightly Watchmen of and for the ſaid Pariſh, and being in his Office and Place as ſuch, performing his Duty of a Watchman there, at an unſeaſonable Time, *i. e.* between One and Two in the Morning, did apprehend and take into his Cuſtody One *Margaret Prince* then and there BEING a looſe idle lewd and diſorderly Perſon and a Common Street-Walker, and *being* then and there behaving herſelf riotouſly, and Walking the Streets there to pick up Men, in Breach of His Majeſty's Peace; And did then and there take lead and convey the ſaid *Margaret Prince* in his Cuſtody to a certain Priſon called the Watch-houſe in the ſaid Pariſh, and did there *deliver Her* in Cuſtody unto one *John Bootie*, who then and there was one of the Conſtables of the ſaid Pariſh, and then and there being in the Execution of his ſaid Office of ſuch Conſtable, as the Head of the Nightly Watch of the ſaid Pariſh; and did then and there *leave and deliver up* Her the ſaid *Margaret Prince in Charge with the ſaid John Bootie*, ſo being ſuch Conſtable as aforeſaid, and in the Execution of his ſaid Office as aforeſaid; and did then and there CHARGE *and* REQUEST *the ſaid John Bootie* ſo being ſuch Conſtable as aforeſaid *to keep and detain* the ſaid *Margaret Prince* SO BEING ſuch looſe idle lewd and diſorderly Perſon and a Common Street-Walker walking the Streets there to pick up Men as aforeſaid, IN HIS CUSTODY, UNTIL the ſaid *Margaret Prince* could be carried and conveyed in Cuſtody before ſome One of His Majeſty's Juſtices aſſigned to keep the Peace in and for the ſaid City and Liberty, there to be dealt with by ſuch Juſtice according to Law for her ſaid Offence and Breach of the King's Peace. Nevertheleſs the Defendant, ſo being &c, not regarding the Duty of his Office &c, *unlawfully and wilfully diſcharged* Her out of his Cuſtody, before that She had been carried before any Juſtice &c, and *would not keep or detain* Her in his Cuſtody for the Purpoſe aforeſaid, but *wilfully ſuffered and permitted Her to eſcape and go at large &c.*

Upon which Indictment, the Defendant having been tried; and a Verdict found againſt him;

Mr. *Aſhurſt* obtained a Rule to ſhew Cauſe why the Judgment ſhould not be arreſted; upon the following

Objec-

* P. 866. * Objection—That it is not charged, that the Defendant KNEW that She was a Street-Walker &c, as this Indictment deſcribes Her to be: Nor indeed is it poſitively charged " that She *was* One." And if She was *not liable* to be detained by him, He would have ſubjected himſelf to an Action for falſe Impriſonment, *if he had detained Her.* It ought to have *expreſsly* charged, " that ſhe *was* ſo; and " that ſhe was delivered to him *as* ſuch."

Mr. *Norton* and Mr. *Stowe* now ſhewed Cauſe againſt arreſting the Judgment.

They inſiſted that the Expreſſions " BEING" and " So " BEING" are ſufficient Allegations " that ſhe WAS ſo; " And that She was delivered to the Defendant *as ſuch.*" And as this is *after Verdict*, it muſt be taken to have been proved at the Trial. It is almoſt impoſſible that He could be ignorant of it: And if He really was ſo, He might have pleaded it.

Mr. *Aſhurſt* and Mr. *Morton*, *contra*—The being *after Verdict*, is no Anſwer, in a *Criminal* Caſe; whatever it may be in a *Civil* One.

Indictments muſt be poſitive and certain, on the Face of them. But this Indictment does not ſufficiently ſhew that She was lawfully in the Cuſtody of the Conſtable. 1 *Hale's Hiſt. P. C.* defines what is lawful Cuſtody.

This is *no poſitive* Allegation, " that She was delivered " to Him *as* a looſe idle and diſorderly Perſon." She might, in Fact, be a looſe idle and diſorderly Woman &c; And yet not delivered to him, AS SUCH. It was at *his Peril* to detain Her, unleſs He was well ſatisfied that She was *liable* to be detained. * 1 *Salk.* 272. *Dominus Rex* v. *Fell*, is in Point, that the Defendant is not liable for the Eſcape of a Perſon not committed to his Cuſtody *as charged* with a Crime.

*V. 4 Mod. 414. S. C. 12 Mod. 226. S. C.

Mr. *Norton*, in Reply to the Caſes, inſiſted that the Term " BEING" is a ſufficient *Averment* of the Fact.

Lord *Mansfield* and Mr. Juſt. *Deniſon* did not come into Court, till towards the End of the Motion: They therefore remained ſilent.

† *V. Hale's H. P. C.* V. 1. *pa.* 234. and *Hawk. P. C.* V. 2. *c.* 19. §. 22.

Mr. Juſt. FOSTER—*Fell's* Caſe was † *Treaſon:* It was an Indictment againſt him, as Keeper of *Newgate*, negligently ſuffering the Eſcape of a Perſon being in his Cuſtody, charged with High Treaſon. But would not that have been ſufficient Ground to have indicted him for a *Miſde-*

* *Miſdemeanour?* And the preſent Caſe is a Miſdemeanour and ſufficiently charged upon the Defendant. * P. 867.

The Peace of this City can never be preſerved, unleſs Watchmen are ſupported in Doing their Duty.

Mr. Juſt. WILMOT—I think it is a Miſdemeanour in the Conſtable, to diſcharge an Offender brought to the Watch-houſe by a Watchman in the Night, though *without* any poſitive Charge. But, in the preſent Caſe, I think that this *is* a *ſufficient Allegation* of the *Fact* of her being ſuch a Perſon, and of her being delivered to the Defendant *as* ſuch a Perſon as ſhe is deſcribed to be.

Per Cur. The RULE "To ſhew Cauſe why the Judg-"ment ſhould not be Arreſted," was DISCHARGED.

Caſe of the Poor Priſoners on the Common Side.

THE Priſoners on the *Common* Side of the Priſon of this Court conceived themſelves to be intitled to the HIGH-BAR-MONEY paid to the Box, upon *certain Motions* made in Court, (*viz.* for Judgments, for Writs of *Mandamus*, *Certiorari*, *Habeas Corpus*, and other Original Writs, *every* Day in Term; and upon *all* Motions whatſoever, on the *laſt* Day of a Term;) and upon All *Affidavits* ſworn *in Court:* Which *Box-Money* or *High-Bar-Money* (as they termed it) amounts to a large Sum in the whole Term; and has been always paid to the Youngeſt Judge's Clerk, at the End of every Term, by the Secondary of the Chief Clerk's Office, to be diſpoſed of by the Judges *in Charity*, as they ſhall think proper.

THIS Money the Priſoners in the King's Bench, confined on the Common Side, fancied to belong to *them*; and accordingly applied for it, by Petition to the Court, as their Predeceſſors had done about 48 Years ago: But they were totally unable to make out their Claim now; And it appeared, upon Examination, that they had been equally unable to ſupport it, at *that* Time.

Mr. Juſt. FOSTER happened to remember that former Application; and that the Matter was referred to Mr. *Harcourt:* And He ſaid that He was preſent in Court, (in 1711, 10 *Ann.*) when Mr. *Harcourt* reported the "Claim of the "Priſoners to be *without Foundation*;" and He had Himſelf taken a Note of Mr. *Harcourt*'s Report; Which Note He now produced and read publicly in Court.

Upon

* P. 868. * Upon the Whole, The COURT (after having referred the Matter to Mr. *Athorpe*, the preſent Secondary of the Crown-Office,) made the following Rule, worded (by ſpecial Direction) thus—

King's Bench } This COURT took into Conſideration the
Poor Priſoners. } Petition of the Poor Priſoners confined on the Common Side of the Priſon of this Court, touching the Money uſually paid into the Box of this Court, upon *Motions* and *Affidavits* made *in Court*; which the Petitioners claim, as due to *Them*.

And Mr. *Athorpe* (to Whom it had been referred, to examine into the Matters alledged in the ſaid Petition,) having this Day *reported* to this Court "That He hath made diligent Inquiry into the Premiſſes; And that no Living "Witneſs was upon ſuch Inquiry produced on the Part of "the Petitioners, who could give Evidence touching the "ſame; And that He had carefully inſpected All the Books "Papers and Writings which could be found relative to the "Premiſſes; And that upon ſuch Inſpection and Inquiry, "it *doth* NOT *appear* that the ſaid Money was *ever* paid to "the ſaid Poor Priſoners or for their Uſe;" and *Mr. Clarke*, Secondary on the Plea-Side, having this Day informed the Court, "That during the Time He hath been in ſaid "Office, and alſo during the Time his late Father Mr. "*Giles Clarke* (long ſince deceaſed) was in the ſame Office, "the ſaid Money hath been conſtantly paid by the Secondary on the Plea-Side, into the Hands of the Clerk of the "Junior Judge of this Court for the Time being, in order "to be by Him paid over to the JUDGES of this Court, in "equal Shares, to be diſpoſed of by THEM, for *ſuch* "CHARITABLE *Purpoſes* as THEY in *their* Diſcretion "ſhould think proper;" *It is Ordered* that the ſaid *Petition* be REJECTED.

The End of *Trinity* Term 1759, 32 & 33 *Geo.* 2.

Michaelmas

* Michaelmas Term

* P. 869.

33 Geo. 2. B. R. 1759.

Rex *verſ.* Corporation of Carmarthen.

Wedneſday 7th November 1759.

MR. Serj. *Nares* moved (very faintly, and without pretending to hope for much Succeſs,) for an Information in Nature of a *Quo Warranto againſt* the *whole* Corporation *(as a* Body,) To ſhew by what Authority they claimed to act *as a* Corporation.

But even he himſelf intimated a Doubt "Whether ſuch "a Species of Information, *(viz.* filed by the Clerk of the "Crown, under Leave of the Court, at the Relation of a "*private* Proſecutor,) could be within the Act of Queen "*Anne.*" [*V.* 9 *Ann. c.* 20. §. 4]

The Court gave no direct Opinion.

However, Lord Mansfield and Mr. Juſtice Denison ſeemed to be pretty clear, That this Act was calculated only againſt Individuals uſurping Offices or Franchiſes in Corporations; and *not* againſt any *Corporation itſelf*, as a Body: And the Words of the Act manifeſtly carry this Meaning.

It was obſerved by Them, and acknowledged by the Serjeant and Mr. *Aſton*, his Colleague in this Motion, "That "there was no Inſtance of any Information in Nature of a "*Quo Warranto* being brought againſt any Corporation *as* "*a Corporation*, for an Uſurpation upon the Crown, *but* "by and in the Name of the Attorney General, on "Behalf of the *Crown.*"

Whereupon, The Counſel made their Motions againſt the ſeveral *Individuals*, "To ſhew by what Authority

" they *reſpectively* claimed to exerciſe their particular Fran-
" chiſes;" and obtained the ordinary Rules againſt them, in the uſual Form.

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* P. 870. * Rex *verſ.* Inhabitants of St. Matthew Bethnal Green.

Saturday 17th *November* 1759.

See this CASE *abridged*, in the TABLE; and *at large* in the Quarto-Edition of my SETTLEMENT CASES, No. 153. p. 482.

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* P. 873. * Goodman et al' *verſ.* Goodright, Leſſee of Richard Williams and Annabella his Wife.

Tueſday 20th *November* 1759.

ERROR from the Grand Seſſions in *Wales*, upon a Judgment there given for the Plaintiff, in an Ejectment brought by *Richard Williams* and *Annabella* his Wife, for Lands in *Denbighſhire*; In which, the Jury had, upon the Trial of it there, found a Special Verdict, to the following Effect.

* P. 874. * That on the 4th of *Auguſt* 1714, *Suſannah Moſtyn* was ſeiſed in Fee, of the Lands in Queſtion.

That on the ſame Day and Year, *Articles of Agreement* were made, by Deed indented, (which they find *in hæc verba*,) between *Edward Wynn* Dr. of Laws, on the firſt Part; *Margaret Wynn*, Mother of the ſaid *Edward*, on the ſecond Part; the ſaid *Suſannah Moſtyn*, on the third Part; and *Elizabeth Lloyd*, on the fourth Part; Reciting an intended Marriage between the ſaid *Edward Wynn* and *Anne Lloyd* (then 18 Years of Age,) Niece of the ſaid *Suſannah Moſtyn* and *Elizabeth Lloyd*: Whereby (amongſt many other Covenants not at preſent material) The ſaid *Suſannah Moſtyn*, in Conſideration of the ſaid Marriage, COVENANTED for Herſelf her Heirs &c with the ſaid *Edward Wynn* and his Heirs, *That She would*, on the Solemnization of the ſaid Marriage, *at the Requeſt* of the ſaid *Edward Wynn* and *Anne Lloyd* or either of them or either of their Heirs, AT OR AFTER SUCH TIME as the ſaid *Edward Wynn* ſhould ſettle *his* Eſtate to the Uſes therein mentioned, *ſettle and convey* (to Truſtees therein named) All her Capital Meſſuage &c &c (the Lands in Queſtion,) and all other the Meſſuages

Meſſuages Lands &c of Her the ſaid *Suſannah Moſtyn*, or whereof or wherein She had any Eſtate, in the ſaid County of *Denbigh*, To hold to them and their Heirs, To the Uſe of the ſaid *Suſannah Moſtyn*, for Life; then to the ſaid Truſtees, for 200 Years, upon Truſts therein after named; And from and after the Determination of that Eſtate, then to the Uſe of the ſaid *Edward Wynn* for Life; Remainder to the Truſtees (to be nominated by Her) to preſerve contingent Remainders &c; Remainder to the ſaid *Anne Lloyd, for Life*; And after the Deceaſe of the ſaid *Edward Wynn* and *Anne Lloyd*, To ſuch Uſes as are therein after named; which Uſes are afterwards declared to be To the Uſe of the firſt and every *other Son* of the Body of the ſaid *Edward* on the Body of the ſaid *Anne* to be begotten, and the *Heirs of the Body* of ſuch firſt and other Son lawfully iſſuing, according to Seniority of Age; And for Default of ſuch Iſſue, To the Uſe of the firſt and every other *Daughter* of the ſaid *Edward* on the Body of the ſaid *Anne* to be begotten, and the *Heirs of the Body* of ſuch firſt and every other *Daughter* lawfully iſſuing, according to Seniority of Age; And for Default of ſuch Iſſue, To the Uſe of the ſaid *Suſannah Moſtyn* her *Heirs* and Aſſigns for *ever*.

The Truſt of the Term of 200 Years was declared to be For the raiſing 500*l.* out of the Rents or by Mortgage &c; to be paid to ſuch Perſon or Perſons, and in ſuch Manner, as the ſaid *Suſannah Moſtyn*, by *Deed or Will*, ſhould direct or appoint.

That the Marriage was accordingly ſolemnized between the ſaid *Edward Wynn* and *Anne Lloyd*.

* That *Suſannah Moſtyn*, after Making the ſaid Articles, *viz.* on 1*ſt March* 1727, duly made and publiſhed her *laſt Will &c*: Wherein, *reciting the ſaid Articles* and the *Proviſions therein* made, as to her Eſtate in the County of *Denbigh*, and appointing the 500*l.* to be raiſed, and paid to her Executrix, She goes on thus—" And Whereas the " Premiſſes ſo *agreed to be ſettled by me* as aforeſaid, from " and after the Death of me the ſaid *Suſannah Moſtyn* " and of the ſaid *Edward Wynn* and his Wife and in Default " of Iſſue of their Two Bodies, *are limited or agreed to be* " *limited to me and my Heirs* as aforeſaid, Now I do hereby " give and deviſe the ſaid Meſſuage Lands Tenements and " Hereditaments and the *abſolute Inheritance* thereof, to the " Uſe and Behoof of the HEIRS OF THE BODY OF " THE SAID ANNE, *by any* OTHER *Huſband lawfully* " *to be begotten*; And for Want of ſuch Iſſue, to the Uſe " and Behoof of my Nephew CHARLES LLOYD of " *Drenewith* in the County of *Salop* Eſq; and of *the Heirs* " *of his Body lawfully iſſuing*; And for Want of ſuch " Iſſue, to the Uſe and Behoof of my Niece *Catharine* " *Longford* Widow, and the Heirs of her Body lawfully " iſſuing; * P. 875.

" iſſuing; And for Want of ſuch Iſſue, to the Uſe and " Behoof of *Elizabeth* now the Wife of *George Ball*, and " the Heirs of her Body lawfully iſſuing; And for Want " of ſuch Iſſue, To the Uſe and Behoof of *Catharine Long-* " *ford* Spinſter, Youngeſt Daughter of the ſaid *Catharine* " *Longford* Widow, and the Heirs of her Body lawfully " iſſuing; And for Want of ſuch Iſſue, to the Uſe and " Behoof of the right Heirs of Me the ſaid *Suſannah Moſtyn*, " for ever."

Suſannah Moſtyn, after Making her ſaid Will, died ſeiſed, on 12*th March* 1728; leaving the ſaid *Anne Wynn her Heir at Law*.

Edward Wynn and *Anne* his Wife entered; and by Deeds of Leaſe and Releaſe, 1ſt and 2d of *March* 1730, *convey* the Premiſſes to make a *Tenant to the Præcipe*, in order to ſuffer a *Common Recovery*: The Uſes of which Common Recovery were to be ſuch as ſhould be declared by an Indenture to be made by the ſaid *Edward Wynn* and *Anne* his Wife.

A COMMON RECOVERY was accordingly ſuffered, at the Great Seſſions at *Wrexham* for the County of *Denbigh*: Wherein the ſaid *Edward Wynn* and *Anne* his Wife were vouched *&c.*

And on the 29th of *May* 1731, by an Indenture of that Date, the Uſes of the ſaid Recovery were declared to be, as follow, *viz.* To the Uſe of the ſaid *Edward Wynn* and his Aſſigns, for Life, without Impeachment of Waſte; And after his Deceaſe, to the ſaid *Anne Wynn* and her Aſſigns, * P. 876. * for Life, without Impeachment of Waſte; Then to Truſtees, to preſerve *&c*; Remainder to the firſt and every other Son of the ſaid *Edward Wynn* on the Body of the ſaid *Anne* to be begotten, and the Heirs of their Bodies reſpectively, according to Seniority of Age; And in Default of ſuch Iſſue, To the firſt and every other Daughter, in like Manner; and after the Determination of the ſeveral Uſes before limited, To ſuch Uſes as they the ſaid *Edward Wynn* and *Anne* his Wife ſhould, by any joint Deed or Writing, limit and appoint; And for want of ſuch Appointment To the *right Heirs of the ſaid* ANNE, *for ever*.

The ſaid *Anne* afterwards died, *viz.* on 12th *July* 1739, without Iſſue of her Body, leaving——her Heir at Law.

The ſaid *Edward Wynn* continued in the Receipt of the Rents and Profits till his Death: Which happened on the 9th of *June* 1755.

After

After the Death of *Suſannah Moſtyn*, *Charles Lloyd* died: He left Iſſue, ANNABELLA, his *only Daughter and Heir*, then and ſtill the *Wife* of *Richard Williams*.

Richard Williams and *Annabella* intermarried in the Lifetime of the ſaid *Charles Lloyd*.

Richard Williams and *Annabella* his Wife, after the ſeveral Deceaſes of the ſaid *Edward Wynn* and *Anne* his Wife, *viz.* on the 15th of *June* 1755, made an Entry *&c*, and demiſed *&c* to *Goodright*, who entered *&c*: And the Defendants below (claiming under the *Heir at Law of Anne Wynne*) entered upon *Goodright*, and ejected him.

But whether upon the Whole *&c*, They pray Advice of the Court: And if *&c*, then they find the Defendants below, guilty *&c*; But if *&c*, then they find them not guilty *&c*.

This Caſe was twice argued; firſt, in *Trinity* Term laſt; and again, in this Term: And the Court gave their Opinion, upon the next Paper-Day after the laſt Argument.

Both the Arguments were very diffuſed (eſpecially the former,) and would be too tedious to repeat; though ſeveral Nice Points were diſcuſſed in them, and the Reaſonings of the Counſel ſupported by a great Variety of Caſes.

It was diſputed, Whether *Ann Wynne* took an Eſtate-Tail by *Implication* by her Aunt's *Will*; (there being no Perſon *in Eſſe* named in it, to ſupport the Remainder to the * Heirs of *Ann*'s Body by a ſecond Huſband:) For it was urged on the Behalf of the Defendant in Error, "That "this was a Deviſe *in verbis de præſenti*; and that the Law "will not ſuffer a *preſent* Deviſe to a Perſon not in being;" and "that *Charles Lloyd* conſequently took an *immediate* "Eſtate *in Poſſeſſion*, as much as if there had been *no* "precedent Deviſe, as this precedent One was totally and "abſolutely void." * P. 887.

Alſo, "Whether the Will is to be taken as an *Execution* "of the Articles by Mrs. *Moſtyn*; and as a *Diſpoſition* of "her Eſtate *according* to her Covenant."

Alſo, "Whether *Ann's Iſſue by a ſecond Huſband* was a "Matter that ought to be *laid quite out of the Caſe*, in the "ſame Manner as if there had been no ſuch Deviſe;" Since the EVENT NEVER *happened*.

Alſo, " Whether *Charles Lloyd* could *take at all*, by this " Will :" And, if He could, then " in *what Manner*." For the Counſel who argued on behalf of the Plaintiffs in Error inſiſted That he could not take, either as a *preſent* or as an *Executory* Deviſe; and that there was *no other* Way by which He could take : But the Counſel for the Defendants in Error endeavoured to ſhew that he might take, *either* Way.

CUR. ADVIS.'

Lord MANSFIELD now delivered the Reſolution of the Court.

This Caſe, when ſtript of a great deal of Learning which may very well be laid out of it, as not being at all eſſential to the Determination of the preſent Queſtion, comes within a very narrow Compaſs.

The whole of the Caſe comes ſingly to this Queſtion— " Whether Mrs. *Moſtyn*, the Teſtatrix, INTENDED to " give her Nephew *Charles Lloyd* and the Heirs of his " Body the Remainder or Reverſion AFTER *the Death* of " Herſelf and Dr. *Edward Wynn*, and *Anne* his Wife, " and of the Heirs of their two Bodies, and alſo of the " Heirs of *Anne*'s Body by any *ſecond* Huſband;" Or " Whe- " ther She *meant* to give him an Eſtate in POSSESSION." For it was admitted, that IF *She did not* INTEND to give Him an Eſtate *in Poſſeſſion*, the Leſſors of the Plaintiff can have no Title.

If this Deviſe is to take Effect *after the Death* of the Teſtatrix Mrs. *Moſtyn*, and of Dr. *Edward Wynn*, and of *Anne* his Wife, and of the Heirs of their two Bodies, and of the Heirs of her Body by any Second Huſband ; then it can be made good, *only* by One of theſe two Ways; *viz. Either* by Way of a *Contingent Remainder*, Or by Way of an *Executory Deviſe*.

* P. 878. * Now, to make it a *contingent Remainder*, All the *former* Eſtates ſpecified in the Articles muſt be conſidered as being *intended* to be given and deviſed BY *this Will :* And then it would follow, that the Eſtates would be of *One and the ſame Nature and Quality*, and limited in *One and the ſame Conveyance* ; and not by ſeveral diſtinct Deeds or Conveyances.

And if the *ſame Kind of Eſtate* be, in the *ſame Will*, limitted to *Anne Wynn* for Life, and to her Iſſue by her firſt Huſband, it would be an Eſtate-Tail executed in *Anne Wynn* ; and ſhe might ſuffer, and has in fact ſuffered a Common Recovery, which will bar the Remainders.

But

But it is not neceſſary for Us to go into the Queſtion "Whether the Articles and the Will can be *tacked together*:" Becauſe, if a Deviſe of the particular Eſtates expreſſed in the Articles cannot be implied by Conſtruction; And ſuppoſing the Deviſe "to the Iſſue of *Anne Wynn* by any "ſecond Huſband" to be void; the Limitation "to CHARLES LLOYD *and the Heirs of* HIS *Body*," can *not* be conſidered as a *Contingent Remainder*.

And if it were to be conſidered as an *Executory Deviſe*, then, not being to take place till after an *indefinite* Failure of Iſſue of the Body of *Anne Wynn* it is TOO REMOTE. And if it was too remote in its *Creation*, the EVENT cannot vary the Conſtruction: So that her *actually* dying without Iſſue can make *no Difference*.

Therefore, *either* Way, 'tis clear that the Leſſor of the Plaintiff below had no Title, *unleſs* it is a PRESENT Deviſe "to *Charles Lloyd* and the Heirs of his Body."

And therefore the Counſel for the Defendant in Error very judiciouſly laboured to prove that Mrs. *Moſtyn* meant in this Deviſe "to Him and the Heirs of his Body," to deviſe the Eſtate to him IMMEDIATELY. This, they found themſelves *obliged* to inſiſt upon, and to endeavour to maintain.

But neither the *Words*, nor the *Nature of the Proviſion* Mrs. *Moſtyn* was making, will admit of *this* Conſtruction. For the Words do by no Means import any ſuch Thing, or any Thing like it; but quite the reverſe. And it can never be imagined to be her Intention to exclude all the Iſſue of her favourite Niece *Anne Wynn*, in order to prefer *Charles Lloyd* and his Iſſue: Indeed, the direct contrary plainly appears.

* It is a FUTURE Deviſe, to take Place after an *indefinite* Failure of Iſſue of the Body of a former Deviſee: Which *far exceeds* the *allowed Compaſs* of a Life or Lives in being, and 21 Years after; (Which is the Line now drawn and very ſenſibly and rightly drawn.) * P. 879.

The *Articles* can *not* be conſidered as EXECUTED: They are only a *Covenant* "That ſhe *will*, on the Solemnization "of the Marriage, *at* the *Requeſt* of *Edward Wynn* and "*Anne*, AT OR AFTER *ſuch Time* as *Edward Wynn* "ſhould ſettle *his* Eſtate &c, ſettle and convey hers." The *Will* does not profeſs to be an Execution of them, Nor does it mention any Truſtees to preſerve Contingent Remainders agreeable to the Articles.

But IF the *Will* was an *Execution of the Articles*, then *Anne Wynn* was *Tenant in Tail*, and might ſuffer the Recovery. If She took Nothing under the Will, She is *Heir at Law* to Mrs. *Moſtyn*. And the Leſſor of the Plaintiff has *no* Title.

Therefore this JUDGMENT muſt be REVERSED.

Hurſt and Another *verſ.* Earl of Winchelſea et al'.

A Special Caſe, out of the Court of Chancery.

Caſe—*Thomas Herbert* Eſq; being ſeized *in Fee* of the Premiſſes in Queſtion, made his laſt Will and Teſtament in Writing &c, bearing Date the 17th of *October* 1734, in theſe Words—" I give and bequeath to my dear and be-
" loved Wife *Elizabeth Herbert* (after Payment of my juſt
" Debts) All my Money, Plate, Jewels, Houſehold-Goods
" and Furniture whereſoever, and all my Goods, Chattels
" and perſonal Eſtate, REAL OR perſonal, whatſoever and
" whereſoever, that ſhall be in my Poſſeſſion, or I ſhall be
" any ways intitled to at the Time of my Deceaſe."

" And I further give deviſe and bequeath to my ſaid
" dear Wife and her Heirs SUCH PART of all my *real*
" Eſtate, that I have *any* POWER *to diſpoſe of* by this my
" Will. And I further give deviſe and bequeath to my
" ſaid Wife, out of the REMAINING Part of my ſaid
" *Real* Eſtate, for her better Support and Maintenance
" TILL *my Son Thomas attain the Age of* 21 *Years*, the
" Sum of 400 *l.* a Year. And my Will is that the ſeveral
" Bequeſts and Deviſes to my ſaid Wife as aforeſaid, ſhall
" *not* nor are intended to *prejudice* my ſaid Wife in her
" *Thirds* or *Dower* out of my ſaid Real Eſtate."

* P. 880. * And He appointed Her Sole Executrix of his Will.

On the 15th Day of *March* 1736, the Teſtator died ſo ſeiſed; and left the ſaid *Elizabeth* his Widow; and *Thomas Herbert* (his only Child by Her) his Heir at Law.

Elizabeth Herbert entered upon, and enjoyed the Real Eſtates; and on the 29th *April* 1739, intermarried with *John Powell* Eſq; (her ſecond Huſband) And previous thereto, by * Indentures dated, reſpectively, on the 24th and 25th *April* 1739, She, by Leaſe and Releaſe, conveyed the Premiſſes in Queſtion to Truſtees &c, to the following Uſes; *viz.* of herſelf and her Aſſigns for Life, without Impeachment of Waſte; then to the Uſe of the Earls of *Hertford* and *Winchelſea* and their Heirs &c, for 200 Years upon

* Theſe Deeds are ſet out at large, in the StatedCaſe: But this is the Subſtance of them.

upon Truſts ſince determined, and ſubject to the Truſts aforeſaid; Remainder to the ſaid *Thomas Herbert* her Son and his Aſſigns for life, without Impeachment of Waſte; then to Truſtees to preſerve contingent Remainders; Remainder in † Tail, to the ſaid *Thomas Herbert* the Son (*viz.* Remainder to the † firſt and every other Son and Sons of the Body of the ſaid *Thomas Herbert* in Tail Male; and in Default &c, to the Uſe and Behoof of the Heirs of his Body generally;) And in Default of ſuch Iſſue, to *ſuch* Uſes and to the Uſe and Behoof of ſuch *Perſon or Perſons*, and for ſuch *Eſtates* Intents and Purpoſes, as She the ſaid *Elizabeth Herbert*, by any *Deed or Deeds* to be by Her duly executed in the Preſence of two or more Witneſſes, or by her *laſt Will* in Writing, or any *Writing purporting to be her Will*, ſigned and publiſhed in the Preſence of three or more credible Witneſſes, whether Covert or Sole, and notwithſtanding her Coverture, ſhould limit or appoint; And for Want of ſuch Limitation or Appointment, to the Uſe and Behoof of the ſaid *Elizabeth Herbert* her Heirs and Aſſigns for ever.

† This is alſo ſet out at large and in proper Form, in the ſtated Caſe.

She died on the 8th of *July* 1739, in the Life-time of her Huſband *John Powell*; Leaving the ſaid *Thomas Herbert*, the Son, her only Child and Heir at Law, being alſo only Child and Heir at Law of the ſaid *Thomas Herbert* deceaſed, her firſt Huſband.

Before her Death, *viz.* on the 8th *May* 1739, She, in the Preſence of 3 credible Witneſſes, and as the Law requires for the Diſpoſition of Real Eſtates, duly made and executed her laſt WILL, or a Writing *purporting to be her Will*, which was ſigned ſealed publiſhed and declared by Her as and for her laſt Will; Whereby She gave ſeveral Legacies, to the ſaid *John Powell* her Huſband, and Others: And She * alſo gave and deviſed thereby as follows, *viz.* "I give to my dearly beloved Son *Thomas Herbert* and his "Heirs and Aſſigns for ever, *All* my REAL and perſonal "Eſtate, Plate, Jewels, &c, &c, and all my Writings &c; "* but firſt *ſubject* to the Payment of my *Debts*, Funeral Expences, and Legacies, and Servants Wages, and "*All other Debts*," (which She thereby *charges upon it.*) And She made her ſaid Son *Thomas Herbert*, and the Earl of *Hertford*, her Executors, and gave the Earl of *Hertford* full Power to act as Guardian for her ſaid Son. On her Death, the Earl, as Guardian to her Son, and for his Uſe and Benefit, entered, and received the Rents and Profits to the Time of the Death of the ſaid *Thomas Herbert* the Son.

* The whole Will is ſet out *verbatim*, in the Caſe. * P. 881.

On the 25th of *February* 1739, *Thomas Herbert* the Son died, an Infant, Inteſtate, without Iſſue, and unmarried; leaving *Roger Powell* Eſq; his *Heir ex parte* PATRIS; and *Lucy Allen*, Widow, his *Heir ex parte* MATRIS.

On

On the Death of the ſaid *Thomas Herbert* the Son, *Roger Powell* entered, and received the Rents and Profits during his Life. But on 9th *June* 1741, *Lucy Allen* filed her Bill againſt the ſaid *Roger Powell* and Others, praying to be let into Poſſeſſion: And, She afterwards dying, *Edward Hurſt* (the Father of the preſent Plaintiffs) as her Repreſentative, exhibited his Bill of Revivor and Supplement. Several Abatements of the Suit having ſince happened, Bills of Revivor and Supplement were duly filed. And the *preſent Plaintiffs*, *William H.* and *Edward H.* now claim the ſaid Eſtates *under* the ſaid *Lucy Allen*, as She was Heir to the ſaid *T. H.* the Son *ex parte* maternâ: And the *preſent Defendants Thomas Morgan*, *Capel Hanbury* and *William Powell*, now claim the ſame *under* the ſaid *Roger Powell* now deceaſed, as He was Heir to the ſaid *T. H.* the Son *ex parte* paternâ.

The Original Cauſe was heard on the 10th of *May* 1755, before Ld. *Hardwicke*; who directed a Caſe to be made, and theſe Two Queſtions to be ſtated for the Opinion of this Court: *viz.*

1ſt Queſtion—"Whether by the Will of *Thomas Herbert*, the Father, (Huſband of *Elizabeth Herbert*, afterwards *Powell*,) the Eſtate in queſtion, (the *Real* Eſtate of the ſaid *Thomas Herbert*,) paſſed to the ſaid *Elizabeth in* FEE."

2d Queſtion—"Whether it deſcended, upon the Death of *Thomas Herbert*, the Son, to his Heirs *ex parte* PATERNA; or to his Heirs *ex parte* MATERNA."

The Suit afterwards abating by the Death of *E. H.* Father to the preſent Plaintiffs, they revived it. On the 27*th January* 1758, The Cauſe came on to be heard before the Lord Keeper: Who ordered "That the ſaid former Order on Hearing ſhould be carried into Execution in like Manner as if *Edward Hurſt* had been Living."

*P. 882. * This Caſe was twice argued in this Court. It was firſt argued (very learnedly and elaborately) by Mr. *Sewell* for the Plaintiffs (claiming under *Lucy Allen* the Maternal Heir,) and Mr. *Yorke*, Solicitor General, for the Defendants (claiming under *Roger Powell* the Paternal Heir,) on *Tueſday* 6th *February* 1759. The ſecond Argument was by Mr. *Norton* for the Plaintiffs, and Mr. *Perrott* for the Defendants, on the 13th and 20th of *November* 1759.

On 27th *November* 1759, The JUDGES of this COURT certified their Opinion, as follows—

Having

Having heard Counſel on both Sides, and conſidered of this Caſe, *We are of Opinion* That the Eſtate in Queſtion in this Cauſe *paſſed* by the Will of *Thomas Herbert* the Father, to the ſaid *Elizabeth* in FEE. We are alſo of *Opinion* That *Thomas Herbert* the Son did *not* take the ſaid Eſtate, from his Mother, by *Purchaſe*, but *by* DESCENT: Conſequently, upon his Death, it deſcended to his Heir *ex parte* MATERNA.

Mansfield. T. Deniſon. M. Foſter. E. Wilmot.

Lord Keeper HENLEY having afterwards decreed accordingly, The Defendants *appealed* to the Houſe of Lords. But before Hearing, it was *compromiſed*, by a Compoſition as to the retroſpective Account of the Profits of the Eſtate; but that the Decree ſhould *ſtand*, with regard to the *Eſtate itſelf*.

Luke et al' *verſ.* Lyde.

A Special Caſe from the laſt *Devonſhire* Aſſizes; reſerved by Ld. *Mansfield*, who went that Circuit, laſt Summer.

The Defendant *Lyde* ſhipped a Cargo of 1501 Quintals of Fiſh, at the Port of *St. John's* in *Newfoundland*, on Board the Ship *Sarah* belonging to the Plaintiffs, to be carried to *Liſbon*. The Plaintiffs were to be paid FREIGHT, at the Rate of Two Shillings *per* Quintal. The Original Price of the ſaid Cargo was, at *Newfoundland*, Ten Shillings and Six pence Sterling *per* Quintal.

The Plaintiffs had alſo, on board the ſaid *Sarah*, a Cargo of 945 Quintals of Fiſh, which was their *own* Property.

The Ship ſailed from the Port of *St. John's*, on 27th *November* 1756; and had proceeded 17 *Days* on her Voy-
* age; and was TAKEN on the 14th of *December* follow- * P. 883.
ing, within 4 *Days* Sail of *Liſbon*, by a *French* Ship. And the Captain, the other Officers, and all the Crew (Except One Man and a Boy) were taken out of the *Sarah*, and put on Board the *French* Ship. The Ship *Sarah* was *retaken* on the 17th of the ſame *December* 1756, by an *Engliſh* Privateer; and on the 29th of *December* 1756, brought into the Port of *Biddeford* in *Devonſhire*.

The Plaintiffs, having inſured the Ship and their Part of the Cargo, *abandoned* the ſame *to the Inſurers*. But the *Freight*, which the Owners were intitled to, was *not inſured*.

The

The Defendant had his Goods, of the Recaptors, and paid them 5*s.* *per* Quintal Salvage, at the Rate of 10*s.* *per* Quintal Value.

The Fiſh could not be ſold at all, at *Biddeford*, nor at any other Port in *England*, for more than 10*s.* *per* Quintal, clear of all Charges and Expences in bringing them to ſuch Port. And the moſt beneficial Market (in the Apprehenſion of every Perſon) for diſpoſing of the ſaid Cargo of Fiſh, was at *Bilboa* in *Spain*; to which Place the Defendant *ſent it* in the *March* following; and there was no delay in the Defendant in ſending the ſaid Cargo thither. And it was ſold there for 5*s.* 6*d.* *per* Quintal; clear of the Freight thither, and of all Expences attending the Sale there.

The Freight from *Biddeford* to *Liſbon*, is higher than from *Newfoundland* to *Liſbon*.

From the Time of the Capture, the whole Way that the Ship was afterwards carried, was out of the Courſe of her Voyage to *Liſbon*.

The Queſtion was "Whether the Plaintiffs are intitled to "*Any* and *what* FREIGHT; And at *what Rate*, and ſub-"ject to *what Deduction*."

Mr. *Huſſey*, for the Plaintiffs, obſerved (by Way of Preface) That the Right of the Owners of the Ship was not ſo deveſted by the Capture, as to preclude them from bringing their Action for the Freight.

If the Capture made any Alteration, the *Recapture* put every thing *in ſtatu quo*.

When the Ship came into *Biddeford*, there was a total Incapacity and Inability in the Ship to proceed on the Voyage. And there was an Abandoning by the Owners, and
* P. 884. * Acceptance by the Inſurers. This Inability to proceed was *involuntary*, and *accidental*; without any *Fault* of the Owners, Maſters, or Mariners.

There was no Intention to carry the Goods to *Liſbon*: The Defendant, the Owner of the Fiſh, conſidered *Bilboa* as the better Market for them; and accordingly ſent them thither and ſold them there.

After

After premiſing this, He made two Queſtions:

1ſt Queſtion—Whether ANY *Freight* at all, is due to the Plaintiffs.

2d Queſtion—If any, then WHAT *Freight* is due.

Firſt—He alledged it to be the Rule of the Maritime Law, "That Freight, is due, *unleſs there be ſome Fault* in the "Owners or Maſter." If there be *no* Fault in the Owners or Maſter, the Freight muſt be paid, either *in toto* or *pro rata*.

Molloy 263. lays down the Rule, that where the Diſability of the Ship is inevitable, or accidental, without Fault of the Owners or Maſter, Freight is due; if the Maſter will either mend his Ship, or freight another. But if the Merchant will not agree to that, then Freight is due for ſo much as the Ship hath earned. *Lib.* 2. *c.* 4. §. 4.

The *Shipwreck* of the Ship does *not diſſolve* the Contract, where any Goods are ſaved: The Owners are intitled to their Freight. It is ſo far from diſſolving the Contract, that it gives the Maſter his *Election*, whether to provide another Ship, or not.

In the preſent Caſe, there is nothing to prevent Freight being due. Freight became due from and upon the Freighters taking the Goods into their Poſſeſſion; and continued due, by the Defendants not totally abandoning them.

Second Queſtion—*What* Freight is due to the Plaintiffs.

He inſiſted on the *Whole*. *All* the Goods were *delivered*. The Money paid for Salvage will not leſſen it: For they muſt have paid that, otherwiſe. The Deviation will not leſſen it: For that was not voluntary.

The Privateer who retook this Ship, was intitled only to $\frac{1}{3}$ Part for Salvage: For it was not 96 Hours under Detention. Therefore, if more was paid, it was too much.

* Lord MANSFIELD — It was compounded *at half*: And upon this Caſe, We *muſt* take that Proportion to be *right*. * P. 885.

Mr. *Huſſey* cited, as a Foundation of his Argument, the Caſe of *Lutwidge and How* v. *Grey et al*, heard on the 22d of *February* 1733, in the Houſe of Lords.

Lord

Lord MANSFIELD—The Houſe of Lords determined upon theſe Reaſons (delivered by the Lord Chancellor *Talbot*,) "that the WHOLE *Freight* was due upon the "Goods ſent to *Briſtol*; becauſe the *Maſter* OFFERED *a* "*Ship* to carry the Goods to *Glaſgow*, which was the Port "of Delivery: But as the *Maſter declined* carrying the "*other* Goods to *Glaſgow* (the Port of their Delivery;) "They determined that as to *them*, he ought to be paid "only *pro ratâ*, *viz.* as much as was proportionable to his "Carrying them to *Youghall*, the Place where the Accident "happened." And this was all agreeable to the Maritime Law.

Mr. *Huſſey*—It appears by that Caſe, that the Contract is *not* diſſolved by the *involuntary* Accident; that the Maſter had his *Election* to carry them to the Port of Delivery in another Ship; and that *if he did not*, he ſhall yet be paid *pro rata itineris* to the Place where the Accident happened.

But, at leaſt, *Something* is due; Eſpecially, as the Goods were carried to a beneficial Market.

Mr. *Gould*, for the Defendant, Mr. *Lyde*.

Upon computing the Account of the Prime Coſt and Produce of theſe Goods, as ſtated in this Caſe, it appears that Mr. *Lyde* has *not ſaved a Farthing*.

As to the *Property* not being *deveſted*—The *Plaintiffs have abandoned the Ship*, and given it up abſolutely, to their Inſurers; and never provided any other to carry the Fiſh to *Liſbon*. He mentioned the Caſe of * *Goſs* v. *Withers*, *M.* 1758, 32 *G.* 2. *B. R.* to ſhew that they were not obliged to abandon the Ship.

* *V. ante* 683 to 698.

The Plaintiffs have no Pretence of Satisfaction. Though the Mariners of this Ship were taken out by the Enemy, Yet other Mariners might have been procured. Therefore there was *not* a *total* Inability to proceed.

The Plaintiffs received their *whole* Inſurance upon the Ship, and upon *their* Part of the Goods. And they *never* * *offered* nor meant to furniſh *another* Ship, *to carry the Fiſh to Liſbon:* They had even given up their own Cargo.

* P. 886.

The *Value* of the Fiſh depended upon its being carried to *Liſbon*, to be there againſt the Lent Seaſon.

Malines

Malines Lex Mercatoria, fo. 98 & 21. *par* 5. (tranſcribed by *Molloy*, *V. lib.* 2. *c.* 4. §. 4. *) ſays, "If the Maſter of "the Ship, after his Ship is become diſabled (without his "Fault) will *either* mend it, *or* freight another, to carry "the Goods to the deſtined Port." And in this Caſe, he will be intitled to Freight *in toto*. "But if the *Freighter* "*diſagrees* to the Maſters Carrying them in another Ship, "the Maſter ſhall receive his Freight, in Proportion to what "he has already carried." This relates to *Accidents inevi-*"*table*, and *without any Fault* of the Maſter.

* 'Tis § 5. and *pa.* 254, 255, in the 6th Edition.

Molloy 259 † puts the ſame Caſe, of a Ship *taken by the Enemy*, and retaken, and not otherwiſe incapacitated; and ſays that after Reſtitution, She may proceed; And the *entire* Freight will become due. ‡

† 7th Edit. 1722.

‡ *V. Lib.* 2. *c.* 4. § 13. *pa.* 259. of 6th Edit.

And the Caſe of *Lutwidge and How* v. *Gray et al'* falls in with this Rule, and goes upon the ſame Principles.

It may perhaps be ſaid that the *Freighter* has *not* an abſolute Right to demand his Goods, and carry them *Himſelf* to the deſtined Port of Delivery, and abate a rateable Proportion of Freight: But the Maſter has his *Option*, to provide another Ship, and carry the Goods in it, and receive the *whole* Freight, if he chooſes to do ſo.

But *here*, it is the ſame Thing as if the Goods had been ſunk in the Bottom of the Sea: The Freighter has *totally loſt* his *whole* Riſque. It would be hard, therefore, if he were liable to pay Freight for it.

Mr. *Huſſey* in Reply—*Lyde* was *not a third* Perſon; but the *Contractor to pay the Freight*.

The Plaintiffs Abandoning the Ship to their Inſurers could not deſtroy the Right to the *Freight*: For the *Freight* was neither inſured nor abandoned.

Mr. *Gould* ſays "The Freight *muſt* be paid, and the "*Agreement performed, if* the Maſter provides another Ship "to carry the Goods to the deſtined Port; but *not* if he "does not do ſo, but the *Freighter agrees* to carry them "Himſelf."

* But the Maſter, though he *may* provide another Ship, is not, at all Events, abſolutely obliged to it: He has his *Option*. And the Caſe of *Lutwidge et al'* v. *Gray et al'* ſhews that the Maſter is intitled *pro rata itineris*, *though* he does *not* proceed on his Voyage: And there he had an Allowance *pro rata*; though he refuſed to carry the Goods any further.

* P. 887.

Lord

Lord MANSFIELD ſaid That though He was of the ſame Opinion at the Aſſizes, as He was now; Yet He was deſirous to have a Caſe made of it, in order to ſettle the Point more deliberately, ſolemnly, and notoriouſly; as it was of ſo extenſive a Nature; And eſpecially, as the Maritime Law is not the Law of a particular Country, but the general Law of Nations: Non erit alia Lex Romæ, alia "Athenis; alia nunc, alia poſthac; ſed et apud omnes "gentes et omni tempore, una eademque Lex obtinebit."

He ſaid, He always learned, (even where He had Himſelf no Doubt,) to making *Caſes* for the Opinion of the Court; Not only for the greater Satisfaction of the Parties in the particular Cauſe, but to prevent other Diſputes, by making the Rules of Law and the Ground upon which they are eſtabliſhed *certain* and *notorious:* But He took particular Care that this ſhould not create *Delay* or *Expence* to the Parties; And therefore He always dictated the Caſe in Court, and ſaw it ſigned by Counſel, before another Cauſe was called; and always made it a Condition in the Rule, "that it ſhould be ſet down to be argued within the firſt 4 "Days of the Term." Upon the *ſame* Principle, the Motion "*to put off* the Argument of this Caſe to the next "Term," was refuſed: And the Plaintiff will now have his Judgment within a few Days as ſoon as he could have entered it up if *no* Caſe had been reſerved; at the Expence of a ſingle Argument only; And ſome Rules of the Maritime Law, applicable to a Variety of Caſes, will be better known. He ſaid, before He entered into it particularly, He would lay down a few *Principles, viz.*

If a freighted Ship becomes *accidentally* diſabled on its Voyage (*without* the Fault of the Maſter,) The Maſter has his *Option* of *two* Things; either to *refit* it, (if that can be done within convenient Time;) or to hire *another* Ship to carry the Goods to the Port of Delivery. If the Merchant diſagrees to this, and will not let him do ſo, the Maſter will be entitled to the WHOLE Freight of the *full* Voyage. And ſo it was determined in the Houſe of Lords, in that Caſe of *Lutwidge and How* v. *Gray et al'.*

As to the *Value* of the Goods—It is Nothing to the Maſter of the Ship, "whether the Goods are ſpoiled or not," Provided the Freighter takes them: It is enough if the
* P. 888. * Maſter has *carried* them. For *by doing ſo*, he has *earned* his Freight. And the Merchant ſhall be obliged to take *All* that are ſaved, or *None:* He ſhall not take *ſome* and abandon the *reſt*; and ſo pick and chooſe what he likes, taking that which is not damaged, and leaving that which is ſpoiled or damaged. If he abandons *All*, he is excuſed Freight. And he

he may abandon *all*, though they are not All loſt. (I call the Freighter, the Merchant; And the Other, the Maſter, for the clearer Diſtinction.)

Now here is a Capture *without any Fault of the Maſter*; And then a *Re-Capture*. The Merchant does not abandon, but takes the Goods; and does *not require* the Maſter to carry them to *Liſbon*, the Port of Delivery. Indeed, the Maſter *could not* carry them in the ſame Ship; for it was diſabled, and was itſelf abandoned to the Inſurers of it: And he would not deſire to find Another; becauſe the Freight was higher from *Biddeford* to *Liſbon* than from *Newfoundland* to *Liſbon*.

There can be no Doubt but that SOME Freight is due: For the Goods were *not abandoned* by the Freighter; but *received* by him of the Recaptor.

The Queſtion will be "WHAT Freight?"

The Anſwer is "A RATEABLE Freight:" *i. e. pro rata itineris.*

If the Maſter has his *Election* to provide another Ship, to carry the Goods to the Port of Delivery; and the Merchant does not even deſire him to do ſo; The Maſter is ſtill intitled to a Proportion, *pro rata of the former* Part of the Voyage.

I take the Proportion of the *Salvage* here, to be HALF of the whole Cargo; upon the State of the Caſe as here agreed upon. And it is reaſonable That the Half here paid to the Recaptor, ſhould be conſidered as *loſt*. For the Recaptor was *not obliged to agree to a Valuation*; But he might have had the Goods *actually ſold*, if he had ſo pleaſed, and taken *half the Produce:* And therefore the Half of them are as much *loſt*, as if they remained in the *Enemy's Hands*. So that *Half* the Goods muſt be conſidered as *loſt*; and *Half* as *ſaved*.

Here, the Maſter had come 17 Days of his Voyage, and was within 4 Days of the deſtined Port, when the Accident happened. Therefore he ought to be paid his Freight for $\frac{17}{21}$ Parts of the full Voyage, for *that Half* of the Cargo which was *ſaved*.

* I find by the ancienteſt Laws in the World (the *Rhodian* Laws,) that the Maſter ſhall have a *rateable* Proportion, where he is in *no Fault* *. And *Conſolato del Mere*, a *Spaniſh* Book, is alſo agreeable thereto. Ever ſince the Laws of *Oleron*, it has been ſettled thus. In the Uſages and Cuſtoms of the Sea, (a *French* Book,) with Obſervations thereon, The 4th Article of the Laws of *Oleron* is, "That if a Veſſel be ren-

* P. 889.

* *V.* Artic. 27. 32. 42.

"dered

" dered unfit to proceed in her Voyage, and the Mariners " ſave as much of the Lading as poſſible they can; If the " Merchants require their Goods of the Maſter, He *may* de- " liver them, IF *he pleaſes*, They *paying the Freight* in *Pro-* " *portion* to the Part of the Voyage that IS PERFORMED, " and the Coſts of the Salvage: But if the Maſter can rea- " dily *repair* his Ship, He may do it; Or if he pleaſes, He " may freight *another* Ship to perform his Voyage." Amongſt the Obſervations thereon, The firſt is " that this Law does " not relate to a total and entire Loſs, but only to *Salvage*; " Or rather, not to the Shipwreck, but to the *Diſabling* of " a Ship, ſo that ſhe can not proceed in her Voyage with- " out refitting: In which Caſe, the Merchants may have " their Goods again, *paying* the Freight, *in Proportion* to " the Way the Ship made." *

* *Wiſbuy* Artic. 33. The Emperor *Charles* 5. Ord. Art. 40.

The Obſervation adds further—" That if the Maſter can, " in a little Time, *refit* his Veſſel and render her fit to con- " tinue her Voyage; (that is, if he can do it in 3 Days " Time at the moſt, according to the Hanſe-Town Laws;) " Or if he will Himſelf take Freight for the Merchandize, " aboard *another* Ship bound for the *ſame* Port to which He " was bound, He may do it: And, if the Accident did not " happen to him by any *Fault* of his, then the *Freight ſhall be* " PAID HIM." The 37th Article of the Laws of *Wiſbuy* is to the very ſame Purport.

Roccius de Navibus et Naulo, in Note 81ſt. ſays— " De- " clara hoc Dictum. Ubi Nauta munere vehendi *in parte* " ſit functus, quia tunc *pro parte itineris* quo merces inventæ " ſint, vecturam deberi Æquitas ſuadet; et pro eâ rata mer- " cedis ſolutio fieri debet. Ita Paul de Caſtro &c." (Then a String of Authorities follows:) " Et probat Joannes de " Evia &c; Qui hoc extendit in caſu quo merces fuerint *de-* " *perditæ (totally loſt)* unâ cum Navi, et certa Pars ipſarum " mercium poſtea fuerit ſalvata et recuperata; tunc naulum " deberi pro rata mercium recuperatarum, *et pro rata Itineris* " *uſque ad locum in quo Caſus adverſus acciderat*, fundat " &c." (And then He goes on with Authorities.) " Item " declara, quòd ſi Dominus ſeu magiſter navis ſolverit merca- " tori pretium mercium deperditarum, tunc tenetur merca- " tor ad ſolutionem nauli; quia merces habentur ac ſi ſal- " vatæ fuiſſent."

* P. 890. * In another Book intitled *The Ordinance of Lewis the 14th*, eſtabliſhed in 1681, (collected and compiled under the Authority of *M. Colbert*,) the ſame Rules are laid down; particularly in the 18th, 19th, 21ſt and 22d Articles.—Art. 18th directs, That *no* Freight ſhall be due, for Goods *loſt* by Shipwreck, or *taken* by Pirates or Enemies. Art. 19th is, That if the Ship and Goods be ranſomed, the Maſter ſhall

be paid his Freight *to the Place* where they were taken: And he ſhall be paid his *whole* Freight, if he conduct them to the Place agreed on; He contributing towards the Ranſom. (Art. 20th ſettles the Rate of Contribution.) Art. 21ſt. The Maſter ſhall likewiſe be paid the Freight of Goods ſaved from Shipwreck; *He conducting* them to the Place appointed. Art. 22d. If he can not find a Ship to carry thither the Goods preſerved, He ſhall *only* be paid his Freight IN PROPORTION *to what he has* PERFORMED of the Voyage.

And the Caſe in the Houſe of Lords between *Lutwidge and How* v. *Grey et al'* is alſo in Point; and was well conſidered there: And Ld. *Talbot* gave the Reaſons of the Judgment of the Houſe, at length.

Therefore in the preſent Caſe, a *Rateable Proportion* of the Freight ought to be paid for half the Goods.

It is quite immaterial What the Merchant made of the Goods afterwards; for the Maſter had Nothing at all to do with the Goodneſs or Badneſs of the Market: Nor indeed can that be properly known, till after the Freight is paid; For the Maſter is *not bound to deliver* the Goods, *till after* he is paid his Freight. No ſort of Notice was taken of *that* Matter, in the Caſe of *Lutwidge and How* v. *Gray*, *in the Houſe of Lords:* And yet there the Tobacco was damaged very greatly; even ſo much that a great Part of it was burnt at the Scales, at *Glaſgow*.

Therefore the Verdict muſt be for 60 *l.* 14 *s.* which, upon Computation, amounts to the rateable Proportion of the Freight; being $\frac{17}{21}$ of 75 *l.* the half of 150 *l.*

Conſequently, the Verdict which was for 70 *l.* muſt be ſet right, and made 60 *l.* 14 *s.*

Per. Cur.

Let the *Poſtea* be delivered to the PLAINTIFF.

* P. 891.

Friday 23d *November* 1759.

Moriſſet *verſ.* King.

THIS was an Action of Debt on Bond, in the Penalty of 200*l.* conditioned for the due Performance of certain Articles: Which Articles recited that *Mary Moriſſet* had lent *Daniel King* the Sum of 100*l.* to be repaid to her at the End of 4 Years *without Intereſt*; but in Conſideration that the ſaid *Daniel King* his Executors and Adminiſtrators ſhould find and provide for *Mary Dubois*, *Daughter* of the ſaid *Mary Moriſſet* (the Obligee,) *Meat and Drink in the Houſe* where he dwelt or ſhould dwell, *for four Years*, if the ſaid *Mary Dubois* ſhould ſo long live; And that ſhe ſhould, during the ſaid Term, *board with him*, and that ſhe ſhould be *Co-partner with Mary King*, *Wife of the ſaid Daniel King*, in the Buſineſs of a *Milliner*; and ſhould, all that Time, *bear one Moiety* of the Loſſes, Charges (except Houſe-keeping) Shop-Rent, and Materials neceſſary for carrying on the Trade, (which the ſaid *Daniel King* did agree to provide;) And they ſhould be Partners, and each do their utmoſt to carry on the Trade; and ſhould *equally divide the Profits*; And alſo that the ſaid *Daniel King* ſhould *lodge the ſaid Mary Moriſſet*, She paying Him 10*l.* a Year. And at the End of the four Years, *Daniel King* was to repay the 100*l.* And in Caſe of the Death of the ſaid *Mary Dubois*, to pay the Principal together with *lawful* Intereſt for the 100*l.* to the ſaid *Mary Moriſſet*.

The Defendant, after having demanded and had Oyer of the Condition of this Bond and of the Articles therein recited, pleads "That this was a *Corrupt Agreement*;" with an Averment "That the Board of *Mary Moriſſet* (the Mo-"ther) was worth 20*l.* a Year; And the Board of *Mary* "*Dubois* (the Daughter) was worth 10*l.* a Year."

To this Plea, the Plaintiff demurs.

The only Queſtion was Whether this was an *Uſurious Contract*, within the Statute of 12 *Ann. Stat.* 2. *c.* 16. Which makes void All Bonds, Contracts and Aſſurances, where more than 5*l. per Cent. per Annum* is directly or indirectly taken for any Loan.

Mr. *Aſpinall* argued, as Counſel for the Plaintiff; and Mr. *Wedderburn*, for the Defendant.

The Court were extremely clear that this Caſe cannot be within the Statute of Uſury.

Lord

* Lord MANSFIELD obſerved, That it is impoſſible to ſay that *King might not* receive ſo much Advantage by this Partnerſhip, as to be *worth* the Conſideration. It *might* be a very advantageous Bargain to *King*: Here might be Recommendation, Skill, Labour or other Benefits ariſing to Him from it. * P. 892.

He mentioned the Caſe of Mr. *Hubert*, who entered into a private ſecret Partnerſhip with *Nelſon*, who drew him into a Bankruptcy thereby. So here the Plaintiff's Daughter might have been drawn into a Bankruptcy, by Means of this Agreement: Which would have been more ſevere to Her, perhaps, than the Penalty of this Statute of Uſury would be.

* Mr. Juſt. FOSTER and Mr. Juſt. WILMOT concurred with the Chief Juſtice. They ſaid, It did not explicitly appear whether this was a prudent Agreement or not: But it *might* be beneficial to *King* upon the *Whole*; at leaſt, it was not *ſuch* a Contract as could be adjudged by the Court to be *uſurious* within the Statute. * Mr. Juſt. *Deniſon* was abſent.

JUDGMENT for the PLAINTIFF.

Rex *verſ.* Maſter and Wardens of the Company of Surgeons in London.

Saturday 24th November 1759.

THIS was a Cauſe that ſtood in the Crown Paper, upon a Return to a *Mandamus* directed to the Maſter and Wardens of the Company of SURGEONS of *London*; Reciting a Cuſtom in the ſaid City, "That every Freeman "of the ſaid City, uſing and exerciſing the Art Science or "Myſtery of *Surgery* within the ſaid City, hath *a Right*, "in reſpect thereof, *to have and take* APPRENTICES, "of the Age of 14 Years or upwards, to be educated and "inſtructed in the ſaid Art Science or Myſtery, for the "Space of 7 Years; Which ſaid *Apprentices* have been "uſed and accuſtomed to be ADMITTED *and* BOUND *in* "*the Preſence or with the Conſent of the Maſter and Wardens or ſome of them*;" And reciting that *Richard Guy*, a Freeman of the ſaid City, and alſo One of the Freemen of the ſaid Company of Surgeons of the ſaid City, being deſirous of taking *Melmoth Guy*, his Son, aged 15 Years, to be his Apprentice for the Term of 7 Years, to be educated and inſtructed in the ſaid Art Science or Myſtery of Surgery, had often offered the ſaid *Melmoth Guy* to be admitted and bound, before the ſaid Maſter and Wardens or ſome of them, his ſaid Apprentice for the Term of 7 Years, in the ſaid Art Science or Myſtery, according to the ſaid Cuſtom; And that the ſaid *Melmoth Guy* had alſo often offered Himſelf to them or ſome of them, to be admitted and bound

* P. 893. * before them or ſome of them, an Apprentice to the ſaid *Richard Guy* for the ſaid Term, in the ſaid Art Science or Myſtery; And that the ſaid Maſter and Wardens had *not permitted* the ſaid *Melmoth Guy* to be bound Apprentice to the ſaid *Richard Guy*, for the Term of 7 Years, before them or any of them, but have altogether refuſed and ſtill refuſe ſo to do; And Commanding them, immediately and without Delay, in due Manner to *permit* the ſaid *Melmoth Guy* to be ADMITTED *and* BOUND, before them or ſome of them, *an Apprentice* to the ſaid *Richard Guy*, for the Term aforeſaid, in the ſaid Art Science or Myſtery according to the ſaid Cuſtom, or ſignify Cauſe to the Contrary.

The Return of the Maſter and Wardens admits the Whole of the Cuſtom and Facts, to be as they are alledged in the Writ. But they further certify and return, That long before the ſaid *Richard Guy* offered his ſaid Son *Melmoth*, or the ſaid *Melmoth* offered Himſelf to them or any of them, to be admitted and bound before them or any of them, an Apprentice for the ſaid Term of 7 Years, in the ſaid Art Science or Myſtery of Surgery, according to the Cuſtom aforeſaid; and after the Making of a certain Act of Parliament intitled "An Act for making the Surgeons of "*London*, and the Barbers of *London*, two ſeparate and "diſtinct Corporations;" to wit, on the 7th Day of *April* in the Year of our Lord 1748, *at Stationers-Hall* in *London* aforeſaid; *John Freke*, then and there being Maſter of the ſaid Company of *Surgeons*, and *William Pyle* and *Legard Sparham*, then being two of the Governors of the ſaid Company of Surgeons, before that Time duly elected choſen appointed and ſworn into their ſaid reſpective Offices; And alſo *John Ranby* Eſq; *Cæſar Hawkins* Eſq; *William Petty* Eſq; *Joſeph Sandford*, *William Cheſelden* Eſq; *James Hicks*, *Peter Sainthill*, *Noah Roul*, *John Weſtbrook*, *William Singleton*, *James Phillips*, *Joſeph Webb*, *Mark Hawkins*, *Chriſtopher Fullagar*, *Edward Nourſe*, *John Girle* Eſq; *and John Townſend*, being then and there Nine and more of the Members of the Court of Aſſiſtants of the ſaid Company of Surgeons, before that Time duly elected choſen appointed and ſworn to be of the ſaid Court of Aſſiſtants, did hold a Court and Aſſembly, at *Stationers-Hall London* aforeſaid, in order to treat and conſult about and concerning the Rule Order State and Government of the ſaid Company of Surgeons; And that the ſaid *John Freke*, ſo being then and there Maſter of the ſaid Company of Surgeons, and the ſaid *William Pyle* and *Legard Sparham*, ſo being then and there Two of the ſaid Governors of the ſaid Company of Surgeons, and the ſaid *John Ranby* Eſq; *Cæſar Hawkins* Eſq; *&c. &c. &c*, ſo being then and there Nine and more of the Members of the ſaid Court of Aſſiſtants of that Company, being All then and there duly aſſembled as aforeſaid, did then and there, according to the Form of the Statute in that Caſe made

* made and provided, make ordain conſtitute and eſtabliſh a certain BY-LAW *and* ORDINANCE, for the Regulation Government and Advantage of the ſaid Company of Surgeons, in the Words following. To wit, *Item*, It is *Ordained* "That *no Member* of the ſaid Company *ſhall take* "any Perſon into his Service, *As his Apprentice*, to be in- "ſtructed in the Art or Science of Surgery, for any ſhorter "Time than 7 Years; *Which Perſon* SHALL UNDER- "STAND *the* LATIN *Tongue*; HIS ABILITY *wherein* "ſhall, BEFORE *his being bound*, be *tried by the Governors* "*or one of them*. And every Freeman of this Company "or Foreign Brother ſhall, within One Month next after "his Entertainment of any Perſon in Order to being his "Apprentice, *Preſent* ſuch Perſon before the Governors "or Two of them, *at a Court to be by them held*; and "*there bind* ſuch Perſon to him *before the ſaid Governors*, "by Indenture; Upon pain of forfeiting 20*l*. of lawful "Money: And the Clerk of the ſaid Company SHALL "NOT BIND any Perſon who has *not* been ſo preſented "and examined; upon pain of forfeiting the Sum of 10*l*. of "lawful Money and being liable to be amoved from his ſaid "Office. And no Apprentice ſhall be turned over from "One Maſter to Another, but at a Court in the Preſence "of the Maſter and Wardens or One of them: And One "Guinea, and no more, ſhall be paid for the ſame." * P. 894.

Which ſaid *Ordinance* or *By-Law*, ſo made as aforeſaid, after the Making thereof as aforeſaid, and long before the ſaid *Richard Guy* had offered the ſaid *Melmoth*, or the ſaid *Melmoth* had offered Himſelf to be admitted and bound before them or any of them, an Apprentice to the ſaid *Richard Guy*, for the Term of 7 Years, in the ſaid Art Science or Myſtery of Surgery, according to the Cuſtom aforeſaid, to wit, on the 9th Day of the ſame *April* in the ſaid Year of our Lord 1748, was examined approved and allowed by the Right Honourable *Philip* Lord *Hardwicke* the then Lord Chancellor of *Great Britain*, and by Sir *William Lee* Knt. the then Lord Chief Juſtice of His Majeſty's Court of King's Bench, and Sir *John Willes* Knt. the then Lord Chief Juſtice of His Majeſty's Court of Common Bench, according to the Form of the Statute in that Caſe made and provided.

They further return That the ſaid Ordinance or By-Law, ſo made examined approved and allowed as aforeſaid, hath ever ſince the Making Examination Approbation and Allowance thereof as aforeſaid, been, and now is in full Force and Effect, and in no wiſe annulled revoked or vacated.

They then return That after the Making Examination Approbation and Allowance of the ſaid Ordinance or By-Law as aforeſaid, and before the Iſſuing of this Writ, to wit, on the 3d of *May* in the Year of our Lord 1759, at a certain Court then holden at *Surgeons Hall* in the *Old*

* P. 895. *Bailey London*, by *Mark Hawkins* then Maſter, and *Chriſtopher Fullagar* and *Edward Nourſe* then Governors of the ſaid Company of Surgeons, (They the ſaid *Mark Hawkins Chriſtopher Fullagar* and *Edward Nourſe*, having before that Time being duly elected choſen appointed and ſworn into their ſaid reſpective Offices, according to the Form of the Statute in that Caſe made and provided,) came the ſaid *Richard Guy* before the ſaid Court, and offered and preſented his ſaid Son *Melmoth*; And the ſaid *Melmoth* did then and there offer Himſelf to the ſaid Maſter and Governors then being at that Court, to be admitted and bound, before them, an Apprentice to the ſaid *Richard Guy*, for the Term of 7 Years, in the ſaid Art Science or Myſtery of Surgery; And that the ſaid *Melmoth Guy*, being ſo offered and preſented as aforeſaid, was then and there *examined* touching his Knowledge in the *Latin* Tongue; And his Ability therein, *in Purſuance* of the Ordinance or By-Law aforeſaid, was then and there *fairly*, *candidly*, and *impartially* TRIED by the ſaid *Edward Nourſe*, He the ſaid *Edward* being then and there One of the Governors of the ſaid Company of Surgeons: And that the ſaid *Melmoth Guy*, UPON *ſuch his Examination*, and *upon his Ability* in the *Latin Tongue* being ſo as aforeſaid *tried* by the ſaid *Edward Nourſe* (ſo being one of the Governors or Wardens of the ſaid Company as aforeſaid,) *was found* NOT *to underſtand* the *Latin* Tongue, but to be WHOLLY IGNORANT *thereof:* and was then and there SO ADJUDGED *and declared* to be, by the ſaid *Edward Nourſe*, on ſuch Trial.—Wherefore the ſaid Court could not conſent, but did then and there refuſe to permit the ſaid *Melmoth Guy* to be admitted and bound an Apprentice to the ſaid *Richard Guy*, for the Term of 7 Years, in the ſaid Art Science or Myſtery of Surgery, according to the Cuſtom aforeſaid, UNTIL ſuch Time as the ſaid *Melmoth Guy ſhould underſtand* the *Latin* Tongue, as by the aforeſaid Ordinance or By-Law is in that Behalf required.

They further return expreſsly and poſitively, That the ſaid *Melmoth Guy*, when he was ſo preſented and offered as aforeſaid, before the aforeſaid Maſter and Governors or Wardens of the ſaid Company of Surgeons, at the ſaid Court, by them held for the Purpoſe herein before in that Behalf mentioned, DID NOT underſtand the *Latin* Tongue; but WAS UTTERLY IGNORANT of the ſame: And that the ſaid *Melmoth Guy* hath NOT, at any Time before or ſince his being ſo examined and tried as to his Ability in the *Latin* Tongue as aforeſaid, *offered himſelf or been preſented* to the ſaid Company or Governors thereof, or any One of them for the Time being, *to be tried* as to his Ability in the *Latin* Tongue.

And therefore they cannot permit the ſaid *Melmoth Guy* to be admitted and bound before them an Apprentice to the

ſaid

* ſaid *Richard Guy* for the ſaid Term of 7 Years, in the ſaid Art Science or Myſtery of Surgery, according to the Cuſtom aforeſaid, as by the Writ they are commanded. * P. 896.

Mr. *Field pro Rege* objected and argued "That this was an "*inſufficient* Return:" For that the *By-Law* is a *bad* One, being made in *Reſtraint of a natural general and common Right.*

The *firſt* Reſtriction of the common Right that every Perſon has of learning and exerciſing any Art in any Place, except where it happens to be reſtrained by Cuſtom, is the Act of 5 *Eliz. c.* 4.

The City of *London* have indeed, *by Cuſtom*, a Power over the Youth of their City, and a Power of excluding Foreigners from exerciſing Trades within their City.

11 *Rep.* 53. *Taylors of Ipſwich Caſe*, ſhews the *general* Law to be, that a Perſon ought not be reſtrained in his lawful Myſtery.

Private Companies cannot make Laws contrary to the *General* Law or to the *Cuſtoms* of great Cities: Though great Cities and Towns may do ſo. This Diſtinction is mentioned in 6 *Mod.* 123. * *Cuddon* v. *Eſtwick.* And He cited the Caſe of *the City of London* v. *Vanacker*, in 1 *Ld. Raym.* 496. where *Holt* Ch. J. ſaid that "if the By-Law was for the "*Benefit of the City*, it would be good." * *V.* 1 *Salk.* 193. S. C.

This By-Law, therefore, is not good, without a particular Cuſtom to ſupport it: For it *reſtrains a Common-Law Right.*

The Return does not aver that the underſtanding the *Latin* Tongue *is* a *neceſſary Qualification* of a Surgeon: And their Art may certainly be performed *without* it. At leaſt, 'tis no Objection to a young Perſon's being put out to *learn* the Art; Whatever it might be to the Admiſſion of a Man to *practiſe* it.

Beſides, "Underſtanding the *Latin* Tongue," is a very *indefinite* and *vague* Expreſſion: And a very different Idea of it would be conceived by different Perſons; as by Dr. *Bentley* (for Inſtance) and by a † Warden of the Surgeons Company. †*N. B.* Mr. *Nourſe* was, in Fact, a very good Scholar.

Bad Conſequences too, may ariſe from this By-Law: And if ſo, it ſhall not prevail. *Godbolt* 254. S. C. with that of *the Taylors of Ipſwich*, (there called *The Cloth-workers of Ipſwich Caſe.*)

If the *By-Law is bad*, this Young Man's not Underſtanding *Latin* will *not cure or help* it. However, the By-Law does *not expreſsly forbid* ſuch a Perſon to be admitted: It is *not mandatory*, but only *directory.*

Mr.

* P. 897. * Mr. Serjeant *Hewitt contra*, was rising up, to speak in Support of the Return.

But Lord MANSFIELD said It was too plain to argue.

Whereupon, *Per Cur.*
RETURN ALLOWED.

Monday 26th *November* 1759.

Rex *verſ.* Inhabitants of Preſton near Feverſham.

See this CASE *abridged*, in the TABLE; and *at large* in the Quarto-Edition of my SETTLEMENT CASES, N°. 154. p. 486.

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* P. 899.

Tueſday 27th *November* 1759.

* Collins *verſ.* Gibbs.

MR. *Burland* had moved, on *Thurſday* laſt, in Arreſt of Judgment, after a Judgment *by* DEFAULT, and a Writ of Inquiry executed, in an Action upon the Caſe on *Aſſumpſit*.

His Objection was The *Want* of an *Averment* of Performance of what He inſiſted to be a CONDITION PRECEDENT.

The Queſtion was, Whether it was a CONDITION PRECEDENT, or not.

It was an Action upon the Caſe wherein the Plaintiff, having firſt recited the Dependency of a former Action brought by the Defendant againſt him, and a Compromiſe thereof, upon an Agreement for the Payment of the Coſts of it by the preſent Defendant to the preſent Plaintiff, on the now Plaintiff's giving him a General Releaſe; ſays the Defendant's Promiſe to pay him his Demand in the preſent Action to have been made, "*In Conſideration* that the ſaid *William* (the "now Plaintiff) at the *Special Inſtance and Requeſt* of the "ſaid *John* (the now Defendant) *would* execute to the ſaid "*John* a *General Releaſe*, to bear Date on the 27th Day of "*July* in the Year aforeſaid," (which was the Day *before* the Agreement,) "And to be filled up in the common and "uſual Form of General Releaſes; He the ſaid *John* (the "preſent

" preſent Defendant) undertook and faithfully promiſed " the ſaid *William* (the preſent Plaintiff,) to pay him " All the Coſts and Expences that he the ſaid *William* had " been at in defending the ſaid Suit, feeing Counſel, ſub- " pœnaing Witneſſes, Journies, and all other Charges and " Demands in the ſaid Suit whatſoever; As ſoon as a Bill of " ſuch Coſts could be prepared and produced to Him the " ſaid *John.*"

Then the Paintiff avers his Coſts and Expences in the ſaid Suit to have been 21*l.* 3*s.* 7*d.* And that a Bill of ſuch Coſts and Expences was prepared, and produced to the Defendant; whereof He had Notice. But the ſaid Defendant *&c*, *&c.*

* Mr. *Burland* urged, that the Plaintiff ought to have *averred* " That He had *given or tendered* to the Defendant " a *General Releaſe executed:*" For that his giving ſuch a Releaſe appeared to be a *Condition precedent*; the Defendant's Promiſe being made *in Conſideration that he would do ſo.* In Proof of which He cited *Hobart* 106. *Ro. Rep.* 1 *Ld. Raym.* 662. *Thorp* v. *Thorp.* * P. 900.

Mr. *Dunning*, *contra* cited 1 *Salk.* 29. *Roe* v. *Haugh in Com' Scac':* Where the Judges held that they ought to do what they could to help the Declaration. (Which Caſe he acknowledged to be *after a Verdict.*)

Mr. *Burland* replied that *that* was after a *Verdict:* This is only after a Judgment by *Default.*

The Releaſe would be *no Bar* to the Demand, in the preſent Caſe; becauſe it is agreed that it ſhould bear Date the Day *before* the Agreement: So that the Cauſe of Action was *ſubſequent* to it, and therefore could *not be barred by it.*

The Plaintiff made NO *Promiſe* " *to execute the Releaſe.*" Therefore We have *no other Method to oblige* him to it. The Payment of the Money is to be " *On* his executing it."

Lord MANSFIELD—The Releaſe is to be given " at the " *Special Inſtance and Requeſt* of *John*" (the now Defendant:) But perhaps he may *never requeſt* it. We will ſee if it can be made good by Conſtruction.

CUR. ADVIS'.

Lord MANSFIELD now delivered the Reſolution of the Court.

This is a Motion made by the *Defendant* in Arreſt of a Judgment, by Default: So that it comes before the Court, exactly

exactly as if it had been upon *Demurrer*; and is not like the Caſes of Objections to Judgments *after Verdict*.

The Plaintiff has *not averred Performance* of what was to be done on *his* Part; nor ſhewn that he was *ready* to perform it.

Therefore We are all of Opinion, That it can *not* be made good, as laid in the Declaration: And the true *Diſtinction*, as to Supplying ſuch Defects, is, whether the Objection be made *after* a Verdict, or *not*.

Therefore the JUDGMENT muſt be ARRESTED.

*P. 901. * Whereupon Mr. *Dunning* moved to *amend*, upon Payment of Coſts; by inſerting ſuch an Averment, as (he ſaid) the Fact really was. Which was oppoſed by Mr. *Burland*; as being *too late*, after Judgment was *arreſted*; and as having never been done.

Lord MANSFIELD—As it is doubtful Whether this *can* be done or not; and as it is certain that the Difference between paying Coſts to amend, and beginning afreſh, is very trifling in this Caſe, it is better to let the Rule be as it was pronounced: And accordingly—Let the Judgment be arreſted.

Per Cur.
JUDGMENT ARRESTED.

Wedneſday 28th November 1759.
**V. ante 799.*

The * Inſolvent Debtors Caſe: or Young *verſ.* Diego Aimes.

†*V. Sect. 13.* THE Court declared that as the † Act of 32 *G. 2. c.* 28. for Relief of Debtors with reſpect to the Impriſonment of their Perſons, *&c*, which did not † commence till the 15th of *June* 1759, (being the firſt Day of *Trinity* Term 1759) could *not*, undoubtedly, *mean* to leave, between the Expiration of the former Act and the Commencement of this, a *Chaſm of 14 Days*, to the *Prejudice* and *Diſadvantage* of inſolvent Debtors, (for whoſe *Relief* it was calculated,) They thought they ought to conſtrue this Act EQUITABLY, for the Benefit and Relief of ſuch Inſolvent Debtors and Priſoners; Eſpecially as the Words of it are "That the Priſoner may exhibit his Petition before "the End of the firſt Term which *ſhall be* next after he "ſhall be charged in Execution." And therefore They thought themſelves at Liberty to conſtrue it, and did accordingly declare their Conſtruction of it to be, "That

"TRINITY

" TRINITY Term 1759, ought to be conſidered as the " *Term in which* ſuch Priſoners were *charged* in Execution;" And conſequently, " that they or ſuch of them as were " precluded by the Expiration of that Act, from complet- " ing their Diſcharge under it, had the *preſent Michaelmas* " *Term*, for the firſt Term next after their being charged " in Execution; At any Time before the End of *which*, " they might *petition*." By which Conſtruction, The Court took Care That theſe Debtors ſhould not ſuffer any Inconvenience, merely by ſuch undeſigned Expiration of an Act made for their Relief, and undoubtedly *meant* (they ſaid) to be continued on *without* any intermediate Chaſm.

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* Rex *verſ.* Inhabitants of Fulham. * P. 902.

This CASE is *abridged*, in the TABLE: And it may be ſeen *at large*, in the Quarto Edition of my SETTLEMENT-CASES, Page 488. N°. 155.

The End of *Michaelmas* Term 1759.

Hilary

* P. 904.

* Hilary Term

33 Geo. 2. B. R. 1760.

Friday 25th *January* 1760.

Gardiner *verſ.* Croaſdale.

THIS Caſe came before the Court, upon a Queſtion reſerved by Lord *Mansfield* at *Niſi prius* at *Guildhall*, upon an Action upon the Caſe, on a *Policy of Inſurance*.

The Inſurance was made upon One fourth Part of the Ship *Encouragement*, and of its Cargo, from *Greenland* to *London*, free from Average under a certain Value, from the Ice.

The Plaintiff declared upon a *total* Loſs of the Ship: The Declaration *expreſsly ſtated a* TOTAL Loſs of it; And the *Damages* were laid for a *total* Loſs.

But the *Evidence* only proved an AVERAGE *or* PARTIAL Loſs: It was not attempted to prove a *total* One; And it was only ſhewn that the Ship had received *ſome Damage*, (ſcarce more than 50 *l.* would have repaired.)

The Defendant's Counſel objected, at the Trial, "That "this Evidence did *not maintain* the Plaintiff's *Declaration*:" And they repreſented the *Practice* to have been on their Side; *viz.* "That Proof of a partial Loſs was not ſuffici-"ent to ſupport a Declaration for a total Loſs."

A Verdict was taken for 20 *l.* as for an *Average* Loſs: But it was agreed on both Sides, that this Verdict ſhould be ſubject to the Opinion of this Court, "Whether it was "maintainable in Point of Law." If the Court ſhould be of Opinion "That it was," then the Plaintiff was to have Judgment: But if the Court ſhould be of Opinion "That "it was not" Then the Plaintiff was to be Non-ſuited.

It

* It was now urged by the Defendant's Counſel, That this Action is in the Nature of a *ſpecial* Action upon the Caſe; and the Plaintiff reſts his Caſe upon a TOTAL Loſs of the Ship: It is not laid as a Conſequence of the Events ſet forth in the Declaration; But He has made this the *Giſt* of his Action. The *Damages*, they ſaid, muſt be taken, upon this Record, to have ariſen from a *total* Loſs: And the Jury are obliged to give Damages *agreeably* to the Plaintiff's *own expreſs Allegation*; and can *not* take into their Conſideration any Damages that are *not alledged*. And here is no Allegation at all of any Average-Damage. They denied that any thing was *put in Iſſue*, upon the *Non Aſſumpſit* pleaded, but the *total* Loſs, which the Plaintiff has alledged and the Defendant has denied: And they ſaid that the *Defence* upon an Average Loſs was, or at leaſt might be, quite *different* from the Defence upon a total Loſs. They added, That if the Defendant had choſen to ſuffer Judgment to go *by Default*, it muſt have been taken, upon this Record, that he had acknowledged it to be a *total* Loſs: And the Damages muſt have been aſſeſſed againſt him accordingly. * P. 905.

They ſaid this was not like a Caſe of *Walker* v. *the Royal Exchange Aſſurance Company*, in 1746 at *Niſi prius*, before Ld. Ch. J. *Lee*: Which was an Action of Covenant upon a Policy of Inſurance, for 800 *l.* on the Ship *Argyle* from to *Viana*. The Breach aſſigned was, "That before the Ship's Arrival at *Viana*, She was *taken* "*by Enemies*, and *thereby totally* loſt." The Defendant alledged "That She left her Convoy improperly; That "She was *retaken* by an *Engliſh* Man of War; That ſhe "was thereupon ſold; That $\frac{1}{8}$ of the Value was paid to "the Re-taker; That the Reſt of the Purchaſe Money was "left at *Oporto*, in the Hands of the *Engliſh* Conſul." And the Defendant's Counſel objected "That upon theſe Cir-"cumſtances, the Ship was *not totally loſt*." It was anſwered on the Plaintiff's Part, "That the Objection would "not hold: For that notwithſtanding the *Recapture*, it was "a *total* Loſs by the Capture." Whereas in the preſent Caſe, *here* is only a *partial* Loſs: So that the two Caſes do not reſemble Each other.

They cited the Caſe of *Hambleton* v. *Veere* 2 *Saund.* 169. as being more appoſite to the preſent Caſe. They alſo cited 2 *Strange* 1250, *Dean* v. *Dicker*, to prove that a Recapture does *not hinder* its being a total Loſs; when it had once become ſo by the Capture.

The COURT were clearly of Opinion with the Plaintiff, even without hearing his Counſel.

Lord

* P. 906. * Lord MANSFIELD—At the Trial, it appeared to me, and ſo the Jury thought, That the preſent Caſe could *not* be conſidered as a *total* Loſs. The Defendant's Counſel objected (as they do now,) " That the Jury could not take " a *partial* Loſs into their Conſideration, upon an *expreſs* " *Declaration* for a TOTAL Loſs:" And I underſtood from them, " that the *Practice* ſupported their Objection."

Mr. *Norton*, who was Counſel for the Plaintiff at the Trial, then argued to the contrary, upon *Principles:* And He alſo cited the Caſe of *Walker* v. *the Royal Exchange Aſſurance Company.* (But that Caſe does not prove much; becauſe that was a *total* Loſs.) I was ſatisfied upon the *Principles*; provided the *Practice* did not interfere with them: Which I was then told it did.

I choſe to put it in ſuch a Shape that the Opinion of the Court might be had, without Delay or Expence.

No Hardſhip was done to the Defendant, upon the *Quantum* of the Damages found: For the Plaintiff took a great deal *leſs* than it clearly appeared upon the Evidence that the Loſs amounted to.

I cannot hear of any ſuch *Determination* as can ſupport the Objection that has been made by the Defendant's Counſel.

Therefore it ſtands ſingly upon *Principles.* And upon *Principles*, it is extremely clear That the Plaintiff may, upon *this Declaration*, recover Damages as for a *partial* Loſs.

This is an *Action upon the Caſe*: Which is a *liberal* Action. And a Plaintiff may recover *leſs* than the Grounds of his Declaration ſupport; though *not more.* This is agreeable to Juſtice, and conſiſtent with his Demand.

Here are two Grounds of the Plaintiff's Declaration; *viz.* The *Policy*, and the *Damage to the Ship.*

As to its being a *total* Loſs, or a *partial* Loſs, *That* is a Queſtion more applicable to the QUANTITY *of the Damages*, than to the *Ground* of the Action. The *Ground* of the Action is the ſame, whether the Loſs be *partial*, or total: *Both* are Perils *within* the Policy.

As to the Defendant's not coming *prepared* to defend a *partial* Loſs—This indeed would be an Objection, *if* it was *true.* But the Defendant does, in Truth, come prepared to

* to ſhew " that *either* no Damages had happened *at all* ; * P. 907.
" Or, at leaſt, that Damages have not happened to *ſuch a*
" *Degree* as the Plaintiff has alledged in his Declaration ;"
Or " That he did not ſign the Policy."

As to the Effects of a *Judgment by Default*—The Defendant could not have been hurt by a Judgment by Default. For the Plaintiff could not have recovered, even upon a Writ of Inquiry, any *greater* Damages than the Plaintiff could *prove*, to the Jury ſworn to aſſeſs them, " That he
" had *actually ſuffered*."

If the preſent Objection was to prevail, it would introduce the Addition of unneceſſary Counts in Declarations, and an enormous Swelling of the Records of the Court. It is more convenient to lay the Caſe ſhort, than prolix.

There is *no Proof* of any PRACTICE contrary to the Principles. It was the *Apprehenſion* of ſuch a contrary Practice, that was the *only Occaſion* of my having any Doubt at the Trial. I am now fully ſatisfied that the Plaintiff may recover either the whole, *or* LESS than he has laid. And therefore this Verdict ought, in my Opinion, *to ſtand*. In an *Ejectment* for more, the Plaintiff may recover leſs : 'Tis every Day's Practice.

Mr. Juſt. DENISON concurred ; and thought it a very plain Caſe. It is an Action *for Damages*, for the Loſs of the Ship. Now, in an Action *for Damages*, the Plaintiff is to recover his Damages, according to his Proof, *pro tanto :* But He is not, in an Action *for Damages*, obliged to prove *All* that he has alledged. If it had been an Action of Covenant for pulling down a Houſe, Would not the Plaintiff be intitled to recover Damages for pulling down *half* the Houſe, provided he had proved that the Defendant did it ? This is *no Variance* of the Evidence from the Declaration : The Evidence tends, in a *certain Degree*, to the Proof of what is alledged in the Declaration. It is not neceſſary to lay two Counts in ſuch a Declaration as this.

Mr. Juſt. FOSTER concurred in the Opinion " That the
" Verdict ought to ſtand."

Mr. Juſt. WILMOT alſo concurred. He ſaid that in Actions *for Damages*, the Plaintiff may recover for All, or for any *Part :* The Damages are ſeverable, and may be given *pro tanto*. Here, Damages are laid for a *total* Loſs ; which is only the *Meaſure* of the Damages : And the Plaintiff *proves a partial* Loſs ; which only affects the *Meaſure* of the Damages, but is *no Variance* from the Allegations contained in the Declaration.

And

* P. 908. * And if this had been a Judgment *by Default*, yet the Plaintiff *could not*, even in *that* Caſe, have recovered Damages for *any more* Loſs than he was able to *prove* under the Writ of Inquiry of Damages.

And as to the Defendant's not having ſufficient *Notice* that he ſhould come *prepared* to defend againſt a *partial* Loſs—I think He *has* ſufficient Notice to come thus prepared: For He ought to come prepared to prove "That no Damage "at all happened." *If any* at all happened, he will be liable *pro tanto*, if it be proved.

Per Cur. unanimouſly,
Let the *Poſtea* be delivered to the PLAINTIFF.

Saturday 26th January 1760.

Rex *verſ.* Benjamin Burgeſs.

A Trial at Bar.

INDICTMENT for a *Nuſance*, in obſtructing an ancient and common *Highway* leading from *Richmond*, through and over *Richmond-Hill* and from thence *through and over Richmond New Park*, to *Coomb-Neville*, for all the King's Subjects, with their HORSES, to go return paſs and RIDE at their free Will and Pleaſure.

Note—

* On 13th *November* 1754. The * former Trial at Bar was for obſtructing an ancient and common Highway for *Carriages Horſemen* AND *Foot-Paſſengers:* Which was laid JOINTLY, *viz.* as a common Highway for *all* theſe.

† On 28th *May* 1756. An Indictment was afterwards found for obſtructing a Foot-way: Which was not defended; (being † given up by the then Attorney General, now Ld. *Mansfield*.)

Theſe two laſt mentioned Indictments (as well as the preſent One) related to *Richmond-Hill* Gate.

Another Indictment was afterwards found againſt *Martha Gray* Keeper of the *Eaſt-Sheen* Gate; and was tried.

‖ At Lent Aſſizes 1758. That Second Trial (which was at *Kingſton* Aſſizes before ‖ Mr. Juſt. FOSTER) was for a Foot-Way only, through the Park, at *Eaſt-Sheen* Gate: And the Gate-Keeper was convicted.

This was for a HORSE-Way only; and the Way was deſcribed to lead through *Richmond* Gate.

Upon

* Upon the firſt Trial, it ſeemed clear beyond all Poſſibility of Doubt, (and ſo the Attorney General now acknowledged,) "That there was an indiſputable Right for FOOT-"Paſſengers, and that there had always been *Ladders* at cer-"tain Gates:" But the Right of paſſing and repaſſing with CARRIAGES or on HORSE-*back* was very weakly ſupported at *that* Time, and moſt ſtrongly contradicted by a great Over-balance of more credible Evidence. * P. 909.

Upon the preſent Trial, the Pretence of Claim to the HORSE-Way was ſo ill ſupported by Evidence on the Part of the Proſecutors; and ſo clearly ſhewn to be ill-founded and imaginary, by the ſtrongeſt Evidence on the other Side, (which fully proved "That 50, 60, 70 Years ago, there "were *Locks* upon all the Gates; that no Perſons could "paſs on Horſe-back or with Wheeled Carriages, *without* "*Keys or Permiſſion* of the Ranger or his Subſtitutes; and "that there had always been a *Fence-Month*, during which "Seaſon No One at all could even make Uſe of the Keys "which the Ranger had given them, to be uſed at all other "Times but that Month;") that the Court and Jury and Audience and alſo the Proſecutors own Counſel were convinced that the Proſecutors had *failed in their Evidence:* And accordingly, the Jury themſelves declared voluntarily and without being aſked their Sentiments, "That they were "quite ſatisfied with the Evidence which had been already "given on the Part of the Defendant."

Whereupon the Defendant's Counſel reſted the Matter here; although they had 45 more Witneſſes ſtill remaining unexamined: And it was thought needleſs for them to ſum up their Evidence, or to ſay any thing more upon the ſubject.

The Jury therefore, without hearing any Remarks or Reply or Summing up the Evidence at all, and without going from the Bar, or having the leaſt Doubt or Heſitation,

ACQUITTED the DEFENDANT.

N. B Soon after the Trial at *Surry* Aſſizes for a Nuſance in obſtructing the *Foot*-Way, whereof the then Defendant *Martha Gray*, Gate-Keeper at *Eaſt-Sheen*-Gate was *convicted* as aforeſaid, very Convenient Ladders were erected, at *thoſe* Gates to which the two former Convictions extended, and where there had anciently been Ladders, till Sir *Robert Walpole* (then Ranger) took them away; *viz* at *Richmond*-Gate, and at *Eaſt-Sheen*-Gate.

* P. 910. *Thurſday* 31ſt *January* 1760.

* Rex *verſ.* Inhabitants of Hitcham.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, pa. 489, No. 156. and pa. 504. No. 161.

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* P. 912. *Friday* 1ſt *February* 1760.

* Strong, Clerk, *verſ.* Teatt, Leſſee of ‡ Mervyn et al'.

‡ The ſix Leſſors of the Plaintiff, in *Ireland*, were *MervynFanning*, *Arthur Mervyn*, *Henry Carey*, *WeſleyHarman*, *Eleanor Irvine*, or *Irvin*, and *Anne Mervyn*: But *only three* of the ſix Demiſes, *viz.* Thoſe of *Weſley Harman*, of *Eleanor Irvine*, and of *Ann Mervyn*, (who All claim by virtue of the Deviſes to the Teſtator's Daughters,) were material.

THIS was a Writ of Error, brought upon a Judgment given by the Court of King's Bench in *Ireland*, for the Plaintiff in Ejectment.

The Ejectment was brought for Lands in the County of *Tyrone*: And upon the Trial, a Special Verdict was found.

The Special Verdict firſt ſtates a long Pedigree of the Family of the *Mervyns*; and alſo ſeveral Deeds, not neceſſary to be here taken Notice of, (as no Queſtion at all ariſes upon them.)

Then it finds That *Audley Mervyn* Eſq; and *Henry* his Son, on the Marriage of the ſaid *Henry* with Mrs. *Mary Tichburn*, executed Deeds of Leaſe and Releaſe dated the 21ſt and 22d of *December* 1711; And that, in Purſuance thereof, a Fine was levied, and a Recovery ſuffered, whereby the Manor of *Arleſtown* in *Tyrone*, (of which the Premiſſes in queſtion are Part,) was ſettled, in ſtrict Settlement, on the ſaid *Audley* (the Father) for Life; then on the ſaid *Henry* (his Son) for Life; Then on the firſt and other Sons of *Henry &c*, and the Iſſue of that Marriage (in common Form,) with ſeveral Terms, Powers, and Proviſoes; with the REVERSION IN FEE to the ſaid *Audley*, the Father. (Which Marriage took Effect: But there was no Iſſue of it.)

That

That *Audley Mervyn* had Iſſue, beſides the ſaid *Henry* (his Eldeſt Son,) three other Sons, *viz. Audley*, *James*, and *Theophilus*; and four Daughters, *viz. Lucy*, (who in her Father's Life-time, married with *Wentworth Harman*,) *Eleanor*, (One of the Leſſors of the Plaintiff, and who afterwards married with *Chriſtopher Irwin*, who has been many Years dead,) *Anne*, (One of the Leſſors of the Plaintiff, who married *James Mervyn* otherwiſe *Richardſon*, long ſince dead,) and *Jane*.

That the ſaid *Audley the Elder*, being ſeiſed as the Law requires, of the ſaid Lands and Tenements, on the 15th of *June* 1717, duly made and publiſhed his laſt *Will and Teſtament*, in Writing; whereby, after reciting "that He was de- "ſirous to make the beſt Proviſion in his Power, for the Sup- "port of his Children and the Peace and Settlement of his "Family," He deviſed as follows; *viz.* "And as to the WORLDLY ESTATE wherewith it hath pleaſed God to bleſs me, I give and bequeath the SAME, in Manner following. I give and bequeath to my dearly beloved Wife *Olivia*, to her proper Uſe and Benefit, All my Plate and Houſhold Goods and Furniture of what kind ſoever, and alſo my Coach and Horſes and their Harneſſes, and three Saddle-Horſes. I alſo conſtitute and appoint my ſaid dear Wife ſole Executrix of this my laſt Will and Teſtament; and do give and bequeath unto Her all the Reſt and Reſidue of my perſonal Eſtate, of what kind ſoever: And I do hereby will and require my ſaid Executrix, aſſoon as She conveniently can, after my Death, to ſell all the Reſt of my Horſes and all my Stock of Cattle; and to apply the Money ariſing by ſuch Sale, and all ſuch Debts as are or ſhall at the Time of my Death be due to me, (particularly, the Sum of 1100*l.* due to me by Judgment affecting the Eſtate of *Richard* late Earl of *Bellamont*, the Sum of 1000*l.* due to me by my Son *Henry Mervyn*, and a Debt of 1000*l.* or 1200*l.* due to me by *Hugh Mervyn*,) and alſo all Arrear of Rents which are or ſhall become due unto me, to the Payment and Diſcharge of ſuch Sums of Money as ſhall be due to me, to any Perſon or Perſons, at the Time of my Death. And to the Intent that all my Debts may be honeſtly and truly paid and diſcharged—

* P. 913.

I do hereby give and deviſe to my ſaid dear Wife OLIVIA *and her* HEIRS, All that and thoſe the Towns Lands and Tenements &c &c (Specifying them by their particular Denominations;) All which Lands and Tenements are ſituate lying and being in the County of *Tyrone*; As alſo the Town and Lands of &c; All which laſt mentioned Lands are ſituate lying and being in the Barony of *Duleek* and County of *Meath*; And *alſo all* OTHER *the Lands Tenements and* HEREDITAMENTS *in the ſaid Counties of Tyrone and Meath or either of them, whereof I am ſeiſed in Fee Simple, or*

of which any other Perſon is ſeiſed in Truſt for me; together with their and every of their Appurtenances; *To the Uſe Intent and Purpoſe* that my ſaid dear Wife ſhall take and receive out of the ſaid *Lands*, as an Addition to her Jointure, One Annuity or Yearly Rent-Charge of 100*l. per Annum*, during her natural Life, to her own proper Uſe and Benefit: And to this *further Uſe and Purpoſe*, that *my ſaid* WIFE may, by SALE of ſuch of the ſaid *Lands* hereby to her deviſed, raiſe ſo much Money as may be ſufficient to pay off and diſcharge ſuch of the ſaid DEBTS, as ſhall not be paid off and diſcharged out of my perſonal Eſtate. And as to ſo much Part of the ſaid Lands and Tenements as ſhall remain *unſold*, To the Uſe following, (*ſubject nevertheleſs* to the Payment of the ſaid Sum of 100*l. per Annum* to my ſaid
* P. 914. * dear Wife during her natural Life) *viz.* To the Uſe of my Son *Audley Mervyn*, for and during his natural Life; And from and after his Death, to the Uſe of his firſt and every other Son and Sons ſeverally and ſucceſſively, and to the Heirs Male of their ſeveral and reſpective Bodies; And for want of ſuch Iſſue, to the Uſe of my Son *James*, for and during his natural Life; and from and after his Death, to the Uſe of his firſt and every other Son and Sons ſeverally and ſucceſſively, and to the Heirs Male of their ſeveral and reſpective Bodies; and for Want of ſuch Iſſue, to the Uſe of my Son *Theophilus*, for and during his natural Life; and from and after his Death, To the Uſe of his firſt and every other Son and Sons ſeverally and ſucceſſively, and the Heirs Male of their ſeveral and reſpective Bodies; And for Want of ſuch Iſſue, To the Uſe of my Son HENRY, for and during his NATURAL LIFE; and from and after his Death, To the Uſe of his firſt and every other Son and Sons ſeverally and ſucceſſively, and the Heirs Male of their ſeveral and reſpective Bodies; And *for Want of ſuch Iſſue*, to the Uſe of Each and Every of my *Daughters* and the Heirs of their ſeveral Bodies as Tenants in Common, and not as Joint-tenants; And for Want of ſuch Iſſue, To *Mervyn Archdall* and *Henry Carey*, my Nephews, and their Heirs.

And it is my further Will and Intention, and I do hereby deviſe, That *if* it ſhall ſo happen, that my Sons *Henry* and *Audley* ſhall both of them die without Iſſue MALE, in the *Life-time of my Son James*, Whereby the Eſtate ſettled upon my Son *Henry*, upon his Marriage, ſhall deſcend come or remain unto my ſaid Son *James*, that then and in ſuch Caſe, my ſaid Son *James* ſhall *not* take any Intereſt or Eſtate in the *Lands and Tenements herein before deviſed unto him*; but that the ſame ſhall *remain and go over* to my Son *Theophilus*, according to ſuch Intereſt and Eſtate as is herein before to him deviſed for want of Iſſue Male of my ſaid Son *James*.

And I will and deviſe that my Executrix ſhall have full Power and Authority, by her laſt Will and Teſtament in Writing,

Writing, to charge or incumber All or any of my Lands and Tenements herein mentioned, with ſuch Portions and Proviſions for all or any of my Daughters, as ſhe ſhall think reaſonable.

And it is my further Will and Intention, that whoever of my Sons ſhall be ſeiſed of an Eſtate or Uſe for Life in the ſaid Lands, ſhall have Power to commit Waſte; as alſo to ſettle a Jointure on any Woman he ſhall marry, in Proportion to her Fortune; and likewiſe to make Leaſes for One two or three Lives or 21 Years, at the higheſt Rent that can be had from a ſolvent Tenant.

* And whereas, by the Settlement made upon the Marriage of my Son *Henry*, I have Power to charge the Eſtate ſettled on my ſaid Son with the Sum of 2500*l.* for the Portions of my younger Children, I do hereby will and direct my Executrix, immediately after my Death to receive the ſaid Sum of 2500*l.* for the Uſe of my Younger Children, and to apply the Intereſt thereof to their Education and Maintenance, in ſuch Manner as She ſhall think fit, and to diſpoſe of the Surplus thereof in Manner following, That is to ſay, to my Sons *James* and *Theophilus* and my Daughters *Eleanor Anne* and *Jane*, the Sum of 500*l.* Each, at ſuch Time as he or ſhe ſhall marry or attain the Age of 21 Years, (which ſhall firſt happen:) And in Caſe any of my ſaid Sons or Daughters ſhall die unmarried and before the Age of 21 Years, I will that my ſaid Executrix ſhall divide among the Survivors of my ſaid Sons *James* and *Theophilus* and my ſaid Daughters *Eleanor Anne* and *Jane*, the Sum of 500*l.* deſigned for Him or Her ſo dying, in ſuch Manner as ſhe ſhall think fitting. * P. 915.

And I alſo will and deviſe, That in caſe my ſeveral *Lands* herein mentioned or any of them ſhall by virtue of this my laſt Will remain and come to my ſaid Son HENRY, that my ſaid Executrix ſhall have Power and Authority to charge and incumber the *ſame* with any Sum not exceeding the Sum of 5000*l.* Sterling, for the Uſe and Advantage of ſuch of my Daughters as ſhall be then alive and unmarried, as an Addition to their Portions.

The Jury find That the ſaid *Audley* the Elder, at the Time of making the ſaid Will, and at his Death, was ſeiſed in Fee, in Poſſeſſion, of the Lands deviſed by expreſs Denominations in his ſaid Will, as in his ſaid Will; and likewiſe ſeiſed in Fee, in Poſſeſſion, at the ſame Time, of the Lands of *Gortmore* in the County of *Tyrone*, of about 200 Acres; And that the Lands in *Tyrone* expreſsly deviſed by the ſaid Will, (including the Value of *Gortmore*,) were of the yearly Value of 500*l.*; And that the Eſtate ſettled by the Deed of the 22d of *December* 1711, was in the Year 1720 or 1721, of the yearly Value of 1800*l.*

That the ſaid *Audley Mervyn* died on the 17th of *June* 1717, ſeiſed as the Law requires, of the Lands and Premiſſes compriſed in the ſaid Settlement of the 22d of *December* 1711; of which, the Lands and Premiſſes in queſtion are Part. And upon his the ſaid *Audley* the Elder's Death, his Eldeſt Son and Heir at Law, HENRY, became ſeiſed thereof as the Law requires; And being ſo ſeiſed, He the ſaid *Henry*, by Leaſe and Releaſe of 29th and 30th of *September* 1729, in Conſideration of 1500*l.* paid, *granted and releaſed the Premiſes in queſtion, to* JOHN STRONG, Clerk, * P. 916. * his Heirs and Aſſigns; Which ſaid *John Strong* entered, and continued the Poſſeſſion during his Life. On the 9th of *March* 1744, *John Strong* died ſeiſed: And on his Death, JAMES STRONG, his Eldeſt Son and Heir, entered and continued the quiet Poſſeſſion till the 11th of *June* 1756.

Olivia Mervyn, who was Wife and Widow to *Audley* the Father, died in the Year 1720.

James Mervyn, Son of *Audley* the Elder, died in 1726, unmarried, and without Iſſue.

Jane Mervyn died in 1725, unmarried, and without Iſſue.

Theophilus Mervyn died in 1736, unmarried and without Iſſue.

Lucy Harman died in 1737; leaving *Weſley Harman*, one of the Leſſors of the Plaintiff, her eldeſt Son and Heir.

Mary, the Wife of *Henry Mervyn*, died in 1735, having never had Iſſue by the ſaid *Henry*.

Audley, the Younger, died in 1746, unmarried and without Iſſue.

HENRY, *the Eldeſt Son* (there called *Henry* the Younger,) died on the 1ſt of *February* 1747, having NEVER *had Iſſue*.

Mervyn Archdall, in the Will mentioned, died in 1727.

Henry Carey, ſurvived him; and died in *September* 1756.

Hugh Mervyn, Son of Sir *Audley Mervyn*, died in 1727; leaving the ſaid *Arthur Mervyn*, One of the Leſſors of the Plaintiff, his eldeſt Son and Heir.

Then the Special Verdict finds that the Leſſors of the Plaintiff, before making the Leaſes in the Declaration mentioned,

tioned, entered and were ſeiſed, and then made the ſeveral Demiſes in the Declaration &c, &c.

But whether, upon the whole Matter aforeſaid, the Defendant *James Strong* be guilty of the Treſpaſs &c, the Jurors know not, &c, &c.

The Court of King's Bench in *Ireland* gave Judgment for the Plaintiff in the Ejectment.

* The whole Eſtate which depended upon the Title ſet up by the Leſſors of the Plaintiff, was of very great Value. The Cauſe had depended a great many Years, and had been argued a great many Times in *Ireland*. * P. 917.

The Court there held " That the *Reverſion in Fee* of " the Lands comprized in the Settlement of 1711, *paſſed by* " *the Will*;" And that the *Uſes* were *legal* Eſtates *executed*, " ſubject to a Charge for the Payment of the Teſtator's " Debts (if any there were,) and to a Power in *Olivia* to " ſell for that Purpoſe; and were *good at Law*, though de- " viſed after an indefinite Payment of ſuch of the Teſtator's " Debts as ſhould not be diſcharged by his Perſonal Eſtate."

This Caſe was argued in *Michaelmas* Term laſt, by Mr. *Perrot* for the Plaintiff in Error, and Mr. *Winn* for the Defendants in Error; but more fully, a ſecond Time, on *Tueſday* laſt, the 29th of *January* 1760, by Mr. *Knowler* for the Plaintiff in Error, and Mr. *Norton* for the Defendants in Error; The Court having refuſed repeated Applications to put off the Argument till the next Term. It was argued very elaborately, upon the Queſtion " Whether " the Leſſors of the Plaintiff in the Ejectment had any " *Legal* Eſtate;" The Counſel for the Defendant in the Ejectment inſiſting " that *Olivia* took the *legal Fee*;" which deſcended (they ſaid) to *Henry* her Eldeſt Son and Heir, and was by him conveyed to the Father of the Defendant in Ejectment: *Or if* She did not, " that the Deviſes thereof " after Payment of Debts GENERALLY, were *executory* and " *too remote*."

This Point concluded to a *Nonſuit* at *Law* only; and to turn the Plaintiffs round to try *another* Kind of Remedy.

The *final Merits* and Queſtion of *Right* depended upon the CONSTRUCTION of the WILL.

It was adjourned, upon the laſt argument, (for want of Time to go through with it,) to the *Friday* next following. On which Day Mr. *Knowler* was beginning to make his Reply: But

Lord

Lord MANSFIELD ſaid, they need not give Him the Trouble of a Reply.

The Queſtions are Two; *viz.* (1ſt.) Whether the *Reverſion* be *within* the Deviſe; And if it be, (2dly.) Whether it is good Deviſe to the Leſſors of the Plaintiff.

* P. 918. * *If* the firſt be againſt the Leſſors of the Plaintiff, the ſecond is immaterial. Upon the firſt, We are quite clear, "that the Judgment is wrong:" And therefore it is not neceſſary to give any Opinion upon the other.

The Points of Law have been argued with a great deal of Skill and Learning; and much has been ſaid upon the Subject of them, very well worth Attention: But as the Caſe ſtands, it is not neceſſary for Us to enter into them; And I give no Sort of Opinion upon them. However thus much I will mention, for the Sake of thoſe who heard the Argument; *viz.* That this Caſe is *not like* the Caſes that have been cited; and particularly, *not like* to that of *Bagſhaw* v. *Spencer*. That was not to the Truſtees and their Heirs "*to the Uſe* of them and their Heirs" (as Mr. *Norton* cited it:) But to them and their Heirs and Aſſigns, "*upon* "*Truſt* that they and the Survivors and Survivor of them "ſhould, out of the Rents and Profits, or by Sale or Mort-"gage, raiſe enough to pay all the Teſtator's Debts *&c.*: "And After thoſe Debts *&c* ſhould be paid, then to Truſ-"tees for the Term of 500 Years; then to Truſtees to the "Uſe of his Nephew *Thomas Bagſhaw* (as to one Moiety) "for Life without Impeachment of Waſte; Remainder to "Truſtees (by Name) to preſerve contingent Remainders; "Remainder to the Heirs of the Body of *Thomas*, in ſtrict "Settlement; Remainder to *Benjamin Bagſhaw* for Life; "then to Truſtees to preſerve contingent Remainders; and "after the Deceaſe of *Benjamin*, then to the Heirs of his "Body lawfully begotten." Great Debts were due from the Teſtator: And Money was raiſed to pay them.

Thomas Bagſhaw died without Iſſue: And *Benjamin* entered, and ſuppoſed himſelf Tenant in Tail in Poſſeſſion; And being ſo in Poſſeſſion, the ſaid *Benjamin Bagſhaw* ſuffered a Common Recovery; and then deviſed to his Wife.

A Bill was brought by the Wife (claiming under the Recovery,) to carry the Truſts into Execution; and for a Conveyance in Fee: And there was a Decree at the Rolls "to carry them into Execution accordingly."

The

The Litigation was between the Remainder-Man, and the Deviſee of *Benjamin:* And the Queſtion was "Whether "*Benjamin Bagſhaw* was Tenant for *Life*, or in *Tail.*" And the Maſter of the Rolls took it to be an Eſtate Tail in *Benjamin Bagſhaw.* The Plaintiff claimed under the Common Recovery ſuffered by *Benjamin:* The Defendants, under the Will of *Benjamin Aſhton*, the original Deviſor. Neither *Party* doubted of its being a *Truſt:* The Diſpute was about the Eſtate deviſed to *Benjamin Bagſhaw*; "Whether "it was for Life or in Tail." * P. 919.

But my Lord Chancellor ſtarted a Doubt, "Whether the "Deviſe to *Benjamin Bagſhaw* was a *Truſt*; or whether it "was a *Uſe executed.*" And *if* it had come out to have been a *Uſe executed*, then the Authority in the Caſe of *Coulſon* v. *Coulſon*, and the Certificate given by this Court in that Caſe, would have ſtood in the Way; and He would have ſent it back to be reconſidered by this Court. But if it was a *Truſt*, then it fell under different Conſiderations.

There, the Truſtees and their Heirs and the Survivor of them, were directed to do *three* Things: And what they were to do, was of ſuch a Nature, that they *muſt neceſſarily* have a *deſcendible* Eſtate in them, to anſwer the *End* of the Truſt. But there aroſe a deciſive Dilemma; Which put an End to its being a Queſtion. The Plaintiff claimed under the common Recovery. But the Teſtator's Debts were *not paid* at the Time of ſuffering it. It was argued on Behalf of the Plaintiff, "That *Benjamin Bagſhaw* took by Execu-"tory Deviſe *after* the Debts ſhould be paid; and that "there was no Danger of a Perpetuity." But it was allowed "that there was a *legal* Eſtate in the Truſtees, *till* the Debts were paid.

Now, IF the legal Eſtate had not taken Effect in *Poſſeſſion* in *Benjamin Bagſhaw*, then there was *no* good Tenant to the *Præcipe.* But *if* it was an *Equitable* Eſtate, then an *Equitable* Tenant to the *Præcipe would have done.* Therefore they were *obliged* to maintain it to be a *Truſt:* For if they had inſiſted on the Authority of *Coulſon* v. *Coulſon*, there the Common Recovery was a bad One.

So that the Caſe of *Bagſhaw* and *Spencer* was not applicable to the preſent Caſe now before Us.

I thought it not improper to ſay thus much, as to the Caſes that have been cited: But I give no Sort of Opinion upon the *preſent* Caſe, as to this Point. It might be worth conſidering too, "Whether this be not a *double* Contingen-"cy;" *viz.* "*If there ſhould be Debts*, then my Wife to "have the Eſtate for Payment of them: *If no Debts*, then, "thoſe in Remainder to take." However, here it does *not appear* that there *were* any Debts.

As

As to the nice Points of Law, and the Form of the Remedy. It is not neceſſary to give any Opinion, if the Plaintiff has NO *fundamental Right* to recover.

Now as to the *fundamental Right* of the Plaintiff, the Caſe is ſhortly this—

* P. 920. * His Lordſhip then ſummarily ſtated the Facts found by the Special Verdict, and particularly the Settlement in *December* 1711: the Circumſtances of the Family; the Will; and the General Clauſe on which the Queſtion ariſes: and then proceeded, to the Effect following.

The Queſtion is "Whether by this Sweeping Reſiduary "Clauſe, the Teſtator *intended* to deviſe the REVERSION "of the Eſtate ſettled on the Marriage of his Eldeſt Son "*Henry* with *Mary Tichburn* by the Settlement of *Decem*- "*ber* 1711."

The *Generality of the Expreſſion*, "And alſo ALL *other* "*the Lands Tenements and* HEREDITAMENTS in the ſaid "Counties of *Tyrone* and *Meath* or either of them, whereof "I am ſeiſed in Fee Simple, or of which any other Perſon "is ſeiſed in Truſt for Me; together with their and every "of their Appurtenances;" *if unreſtrained* and unqualified by other Words, would carry ALL the Teſtator's Eſtate *in Poſſeſſion, Reverſion* or *Remainder*.

But theſe General Words *may*, by other Words and Expreſſions in the Will, be *reſtrained* to any or either of theſe: And it is the ſame Thing, whether it be directly *expreſſed*, or clearly and plainly to be *collected* from the Will.

Now here are *plain Expreſſions* in this Will, which are fully ſufficient to ſhew, that the Teſtator *did* NOT *intend* to deviſe the *Reverſion* of this ſettled Eſtate. One Inſtance is, the Clauſe "That if *Henry* and *Audley* ſhould both of them "die without Iſſue Male in the Life-time of *James*, then "*James* ſhould not take any Intereſt or Eſtate in the Lands "and Tenements therein before deviſed to Him; But that "the ſame ſhould remain and go over to *Theophilus*."

Every Part of this Clauſe is inconſiſtent with any Suppoſition that He meant to deviſe the REVERSION of the Lands in Settlement. And there is another Clauſe which manifeſts the ſame Intention: *viz.* "That if all or any of "his Lands ſhould *by Virtue of his Will* remain and come "to his Son *Henry*, that then his Executrix ſhould have Pow- "er and Authority to charge and incumber the *ſame* with "any

" any Sum not exceeding the Sum of 5000*l.*" So that He Suppoſed *Every Thing* mentioned in and deviſed by his Will *might* come to *Henry*. But the *Reverſion* of the ſettled Eſtate *after the Death* of *Henry*, *never could* come to *Henry*. From whence it follows, that the Teſtator did *not* intend this Reverſion to be included in his Will.

* And there are Powers given by this Will, " to which- * P. 921.
" ever of his Sons ſhould be ſeiſed of an Eſtate or Uſe for
" Life in the *ſaid Lands*, to commit *Waſte*, to ſettle *Join-*
" *tures*, and to make *Leaſes*:" Which Powers are, in their Nature, applicable to *Poſſeſſions* and not to *Reverſions*; and are referred, by the expreſs Words of the Will (*viz.* " in the ſaid Lands,") to *Lands only*, as what he meant to deviſe. And they could never take Effect at all in *Henry* (who was one of the Sons:) For he had them before, and did not want any further Authority to exerciſe them.

If Henry had had no Iſſue Male by his firſt Wife *Mary Tichburn*; and had had Iſſue Male by a ſecond Wife; the *Son* by the *ſecond Wife* could never have taken *any Thing*; though he would have been Grandſon of the Teſtator by his Eldeſt Son, and Heir of the Family: So that the Heir of the Family would have ſtood totally diſinherited. And yet the Reaſon why *Henry* and his Iſſue were, by this Will poſtponed to the Younger Brothers, appears plainly to be, " becauſe they were much *better* provided for:" And the Teſtator underſtood and ſuppoſed that the Lands were ſo ſettled, that ALL the Iſſue Male of *Henry* ſhould have the Eſtate, in their Turns.

Suppoſe *Henry* and *Audley* the Younger Both dead without Iſſue Male; then *James* muſt, upon the Conſtruction of the *Reverſion's paſſing* by the Will, forfeit *every* Thing; not only the Lands *ſettled*, but alſo the Lands *deviſed*; and ſo would not have a Farthing; But the *whole* Eſtate muſt go over, and paſs by Him. For the *Reverſion* of the ſettled Lands being in ſuch Caſe *fallen in*, by the Death of *Henry* without Iſſue of his firſt Marriage, the *whole ſettled Eſtate* muſt go over to *Theophilus* under ſuch a *Conſtruction* of the Will, And by the *expreſs Words* of it, He could take no Intereſt in any of the *Reſt*.

IF the Queſtion had ariſen between the Iſſue Male of *Henry*, which he might have happened to have by a *ſecond* Wife; could it poſſibly be imagined to have been intended by the Teſtator, that in *ſuch* a Caſe, *Henry*'s Sons by a ſecond Wife ſhould be *totally diſinherited?* And yet they *muſt* have been ſo, if the Reverſion of the ſettled Eſtate paſſed by this Deviſe.

If

If *Audley* had died without Iſſue Male, whilſt there were Sons or Male Deſcendants of *Henry* by a *ſecond* Marriage, in being; can it be imagined that the Teſtator ever intended that *James* and his Iſſue Male ſhould take the ſettled Eſtate, in *Excluſion of the Eldeſt Branch* of the Family? And yet He *would* have done ſo, after *Henry*'s Death without Iſſue of his firſt Marriage, *if the* REVERSION *of it paſſed* by the Will.

* P. 922. * Or if there had been no Iſſue at all of either *Henry* or *Audley*; Can it be imagined that he intended to *diſinherit James?*

The Conſequence is too manifeſt to bear an Argument; if it be but attended to, what *Abſurdities* muſt follow from conſtruing the Reverſion to paſs. The Teſtator manifeſtly puts the *deviſed* Eſtate in *Oppoſition* to the *ſettled* Eſtate. He plainly means to deviſe only his *Lands in Poſſeſſion:* And He directs that if ever *James* ſhall come to the Poſſeſſion of the *ſettled* Eſtate, the *deviſed Lands* ſhall then go over to *Theophilus.* And the Conſtruction cannot be varied by the *Event:* We muſt conſtrue it juſt in the *ſame* Manner, as if *Henry had* left Children by a *ſecond* Marriage; or the ſettled Eſtate *had* fallen in to *James.*

It is plain that the Teſtator did NOT *intend* to deviſe the REVERSION of the Lands compriſed in the Settlement made upon the Marriage of *Henry.* Probably, He himſelf, or the Perſon who drew his Will, did not imagine that he had any *Intereſt in* or *Power over* thoſe SETTLED Lands. But it is plain, at leaſt, that He *meant* and had then in *Contemplation*, ONLY the *Lands* whereof he was ſeiſed in Fee in POSSESSION.

He deſcribed ſeveral Lands *nominatim*; and others, *as well as he then could:* But as He could not be minute and *particular* in ſuch Deſcription, it was thought proper to add *General Words.* The Lands He meant to deviſe, were either in the County of *Tyrone*, or of *Meath*; but, it being then uncertain to Him, in *which* County they lay, He ſays "in them *or either* of them:" But ſtill, the whole Deſcription is *Local*; And *Locality* has been conſtrued to mean *Lands* only. Here, the Deſcription is tied up to *Lands:* The former part of the Deviſe ſpecifies them particularly by Name; And the General Sweeping Words are only deſcriptive of *Lands*; "All other the Lands Tenements "and Hereditaments in the ſaid Counties *&c.*" If it had been intended to have carried *Eſtates*, the Drawer of the Will would have added, "And all his *Eſtates* whereof He "or any Perſon in Truſt for him, were ſeiſed in Fee, in "Poſſeſſion, Remainder, or Reverſion; that is, He would have thrown in a ſweeping Clauſe, to carry *Eſtates in* the Lands, as well as the *Lands themſelves.*

An

An *Annuity* is given to *Olivia*, payable out of the *ſaid Lands* deviſed: And there are Powers given to whichever of his Sons ſhould be ſeiſed of an Eſtate or Uſe for Life in the *ſaid Lands*, to commit Waſte, ſettle Jointures, and make Leaſes; which Powers (as I before obſerved) are applicable to *Poſſeſſions* only.

* But theſe minute and critical Obſervations ſerve only to weaken the Argument: Since there are, in this Will, *ſufficient* GENERAL *Words*, which expreſsly and clearly ſhew that the Teſtator had *no* Intention to include the Reverſion of the ſettled Eſtate in his Will, as much as if he had uſed *particular* Words and Expreſſions to declare it directly and explicitly. * P. 923.

In the Caſe of *Coryton* v. *Hellier*, the Teſtator omitted to add the Words "if he ſhall ſo long live," to the Eſtate which he gave to his Son for 99 Years: And yet Lord *Hardwicke* conſtrued it, that it muſt mean not an abſolute Term of Ninety-nine Years, but an Eſtate for 99 Years *qualified by that Reſtriction* "*if* he ſhould ſo long live;" Becauſe it ſo appeared upon the Face of the Will conſidered in *all its Parts* and *taken all together*.

But *this* Caſe is ſtronger; Becauſe it appears clearly upon the very *Words* of the whole Will taken together, that there can be no Doubt of the Teſtator's Intention "That "the *Reverſion* of the Settled Eſtate ſhould NOT be includ-"ed in it: But only the Lands which He had in *Poſſeſſion*." And this makes an End of the Queſtion, upon the FUNDAMENTAL MERITS of the Caſe.

Mr. Juſt. DENISON, having been abſent during the Argument, declined giving any Opinion; But ſeemed ſatisfied with what Lord *Mansfield* had ſaid.

Mr. Juſt. FOSTER ſaid He had made ſome Obſervations upon the Will; But Lord *Mansfield* had gone through it ſo fully, that He needed only to declare his entire Concurrence in the ſame Opinion.

Mr. Juſt. WILMOT alſo entirely concurred; and wondered how any One could entertain any Doubt about it; It being as clear, He ſaid, upon the *whole Tenor and Complexion of the Will*, as the ſtrongeſt *expreſs negative* Clauſe could have made it.

Per Cur.

JUDGMENT REVERSED.

A Writ

A Writ of Error was brought in the Houſe of Lords: And their Lordſhips confined the Counſel to ſpeak to the Conſtruction of the Will, *firſt*.

After hearing *that* Queſtion argued. Their Lordſhips aſked the Opinion of the Judges; who were All unanimous "That the *Reverſion* was NOT INTENDED *to paſs*:"
* P. 924. * And thereupon, their Lordſhips, on the 7th of *May* 1760, unanimouſly *affirmed* the *Judgment of Reverſal*.

As neither the Court of King's Bench, nor the Houſe of Lords took into Conſideration the *Points of Law* upon which the Leſſors of the Plaintiff "having or not having "a good Legal Eſtate" depended, It would have been to no Purpoſe to report the Reaſonings uſed at the *Bar*, upon thoſe Points.

Note. By the Court's having *refuſed* to *adjourn* the Argument of this Verdict, the final Judgment of the Houſe of Lords was obtained ſo ſoon: And a Cauſe which held a great many Years in *Ireland*, went through the Court of King's Bench and the Houſe of Lords here, within the Space of about ſix Months.

Stoteſbury *verſ.* Smith.

THIS was a Writ of Error upon a Judgment given in *White-Chapel* Court, for the Plaintiff there.

The Declaration ſtates That One *Joſhua Redſhaw* had ſued out a *Capias* from the Court of Common Pleas, againſt One *Cooper Stanton*; and that a Writ iſſued accordingly againſt the ſaid *Cooper Stanton*, directed to the Sheriff of *Middleſex &c*, returnable *&c*; And that before the Return of the ſaid Writ, a Warrant was iſſued by the Sheriff, directed to *Miles Smith* One of his Bailiffs, (the Plaintiff below) to arreſt the ſaid *Cooper Stanton*; By Virtue whereof, the ſaid *Miles Smith* did arreſt the ſaid *Cooper Stanton*.

That the ſaid *Cooper Stanton* being ſo in Cuſtody of the ſaid *Miles Smith*, the ſaid *Stoteſbury* (the now Plaintiff in Error) undertook and promiſed to *Smith*, IN CONSIDERATION that the ſaid *Miles Smith* would *accept* of the ſaid *Stoteſbury* and of one *Antony Rippon* to be and *become Bail* for the ſaid *Cooper Stanton*, "that he the ſaid "*Stoteſbury* would well and faithfully pay to the ſaid "*Miles Smith* the Sum of 6 Guineas and a half, when

" and

" and aſſoon as the ſaid *Cooper Stanton* ſhould pay the Sum " of 15 Guineas to him the ſaid *Stoteſbury*.

Then *Smith*, in his Declaration, avers That he took the ſaid Bail accordingly, for *Stanton*; *viz.* the ſaid *Anthony Rippon* and *Stoteſbury*; and that *Cooper Stanton* had paid to the ſaid *Stoteſbury* the Sum of 15 Guineas; but that *Stoteſbury* had not paid the 6 Guineas and a half to him the ſaid *Miles Smith*, according to his ſaid Promiſe and Undertaking.

* There was another Count in the Declaration for 99*s.* had and received by the Defendant *Stoteſbury* for the Uſe of the Plaintiff *Smith*. * P. 925.

Upon *Non Aſſumpſit* pleaded, A General Verdict was given for the Plaintiff below; and *entire* Damages for 99*s.* and a Judgment thereupon: And upon that Judgment this Writ of Error was brought.

Mr. *Gould*, who was Counſel for the Plaintiff in Error, Objected " That the Contract is founded upon an *illegal* " *Conſideration:* And conſequently, as the Damages are " *entire*, if One of the Counts be bad, it is bad for the " *Whole*."

Now this Contract is in the Nature of an EXTORTION: It was a Conſideration required by *Smith* for doing what the Duty of his Office *obliged* Him to do. He was *obliged* to accept Bail without any Reward or Gratuity: And any Promiſe " to give either," is an illegal Conſideration, and *quaſi* Extortion. The Caſes of *Bridge* v. *Cage*, *Cro. Jac.* 103. and *Badow* v. *Salter*, Sir *William Jones* 65. are both of them in Point, to prove this.

Wherefore He prayed that the Judgment be reverſed.

Mr. *Aſpinall contra*, for the Defendant in Error—It is objected that this Contract was unlawful, " Becauſe the Offi- " cer was to have this Money for doing what it was his *Duty* " to have done without it."

But at *Common Law*, the Officer was *not* obliged to admit him to Bail. And the *Stat.* of 23 *H.* 6. *c.* 10. which obliges him to do it upon reaſonable Sureties, is a PRIVATE Act of Parliament, and cannot be taken Advantage of it, without being *particularly pleaded*. In Proof of which, He cited a Caſe which is expreſsly ſo in Point; namely, *Benſon* v. *Welby*, 2 *Sand.* 154: Where the Court unanimouſly agreed it to be a ſettled Point, " that this is a private Sta-

" tute, and that they could not take Notice of it, unleſs " ſpecially pleaded."

If the Officer was *not* obliged to admit *Stanton* to Bail, *then* there might be a ſufficient Reaſon why *Stoteſbury* might have an Intereſt in having the Cuſtody of the Priſoner. In the Caſe of *Barkly and Gibbs* v. *Kempſtow*, *Cro. Eliz.* 123, the Conſideration of the Defendant's Promiſe to keep the Priſoner ſafely, was holden a good One; though it was the Gaoler's Duty.

* P. 926. * It does not appear that *Stoteſbury* was a *proper* Perſon to be Bail: And *if not*, then the Officer was liable to ſuffer for accepting him; and conſequently, had *Reaſon* to require an Indemnification.

But on *this Plea*, the Conſideration muſt be taken to be legal, *after* Verdict. *Batterſey*'s Caſe in *Winch* 48. proves this. For, as the Defendant might there have given the unlawful Impriſonment in *Evidence*, if in Fact, it had been unlawful; ſo here, *if* the Contract *had been illegal*, they might have *proved* it upon the Trial, to have been ſo.

Mr. *Gould*'s Caſes were plain *Extortion*; becauſe there the Officer took Money for doing what was his *Duty*: Whereas here, it was *not* his Duty to take Bail; At leaſt, the Court can *not take* it to be ſo, unleſs the Statute had been *pleaded*.

Mr. *Gould* in Reply—Its being *after Verdict* will not help it: Becauſe it is Extortion upon the *Face* of the Declaration.

The 23 *H.* 8. *c.* 10. can not be conſidered as a *private* Act which the Court cannot take Notice of, unleſs *pleaded*: It is a *General* Law; And the Officer *was* obliged to let *Stanton* to Bail. That Act was *declaratory* of the *Common* Law.

Mr. *Aſpinall*'s Caſes are only Promiſes " to *indemnify*:" This is a *Reward*; Which is *Extortion*.

Lord MANSFIELD—The Man who was arreſted, and gave the 15 Guineas to procure the Bail, is injured by Both theſe contending Parties: They have Both acted wrong towards him.

But though both Parties are equally faulty, *in pari de licto potior eſt Conditio Defendentis*. A Court of Juſtice ought not to relieve a Plaintiff, upon a Ground of Action *immoral* or *illegal*.

Where a Perſon is arreſted for Debt; Either the Officer is not obliged to admit him to Bail, *at all*; Or he is obliged

liged to admit him to Bail, as of *Duty*; Or he may uſe his *Diſcretion*. Now, in *any* of theſe Caſes, it is *Oppreſſion* to take *Money*, for doing what he *ought* to do; even though it be the mere uſing his Diſcretion, "whether he ſhould "admit him to Bail, or not."

Therefore, it is not neceſſary to meddle with any queſtions about the *Stat.* of 23 *H.* 6.

* There is no Pretence for our preſuming the Conſideration to be legal, becauſe it is after a Verdict; Whatever we might do, in a Matter that ſtood indifferent. For here it does *not* ſtand indifferent: It is fully ſtated upon the *Face* of the Declaration; and manifeſtly appears to Us to be *illegal*. * P. 927.

Mr. Juſt. DENISON was of the ſame Opinion, "That this was an "*illegal Conſideration*;" and ſaid, He never ſaw ſuch a Demand ſtated in a Court of Juſtice. The Officer would have been liable to an *Attachment* for this Fact, if he had been complained of for it.

As to the *Verdict*, That can never be a Reaſon for preſuming the Conſideration to be legal; when it is fully ſtated in the Declaration, and appears manifeſtly to be *illegal*.

As to the *Statute* of 23 *H.* 6. *c.* 10. It was made to prevent the Oppreſſions of Sheriffs and Bailiffs; and obliges them to let Perſons arreſted by them, out of Priſon, upon reaſonable Sureties of ſufficient Perſons. But at *Common* Law, the Defendant was to be let to Bail in ſuch an Action as *this*.

However, be the Bailiff's Duty as it may, yet it is certainly oppreſſive to take *Money* for doing it. If this was to be permitted, it would introduce ſuch a Scene of Oppreſſion and Injuſtice, as would be inſufferable.

Mr. *Gould*'s Caſes, cited from *Cro. Jac.* and Sir *William Jones*, ſhew the Caution of Courts of Juſtice, not to endure the Oppreſſion of Officers of Juſtice: And this Caſe is ten Times worſe than the Caſe of the Promiſe made to the Special Bailiff, in Sir *William Jones* 65.

Mr. Juſt. FOSTER concurred in thinking that it would be a great Inlet to Oppreſſion, if ſuch a Conſideration as this, ſhould be eſtabliſhed as legal.

The Caſe is not oppreſſive merely with reſpect to the *Friends* of the Perſon in Cuſtody, or others indifferent to him: But, even an *Enemy* to the Defendant may, by theſe means,

means, get him into his Hands, merely in Order to ſurrender him when he is become Bail for him.

We ſhould have *puniſhed* this Officer for ſuch a Piece of Behaviour, if a Complaint had been made to Us againſt him for it: And ſhall We help and aſſiſt him to obtain the End of it, and carry it into complete Execution in a Court of Juſtice? Surely not.

* P. 928. * Mr. Juſt. WILMOT ſaid he thought this to be a moſt ſhameful and ſcandalous Action.

It would be a ſtrange Thing, if We ſhould aſſiſt him in eſtabliſhing a Contract grounded upon a Conſideration, for which he would have been *puniſhed* by this Court, if he had been indicted for Extortion, or complained of by Way of Motion for an Attachment.

As to his not being *obliged* to admit the Man to Bail—The 23 *H.* 6. *c.* 10. is ſo far indeed a *private* Law that it muſt be PLEADED in Caſes ariſing immediately and directly upon it: But I will take Notice *judicially*, That an Officer *is obliged* to admit a Man to Bail, in ſuch an Action as this, if good and ſufficient and unexceptionable Bail be offered him. It is his *Duty* to do it. And it is the Principle of the *Common* Law, "that an Officer ought not to take *Money* "for doing his *Duty*." It is his Duty to take *good* and *ſufficient* Bail; though he is not obliged to accept *inſufficient*.

But ſuch a Contract as this is, upon a Promiſe made to the Officer, by one of the Bail, "that if the Officer would "accept of Himſelf and one *Anthony Rippon* as Bail for "the Man, He, in Conſideration of this, would pay him "ſix Guineas and a half when the Man ſhould pay him "Fifteen;" (whereby it manifeſtly appears to be agreed amongſt them, that *Stanton* was to give *Stoteſbury* 15 Guineas, to become Bail for him; And *Stoteſbury*, when he ſhould receive the 15 Guineas, was to give the Officer 6 Guineas and a half out of it;) is grounded upon a Conſideration, which is *manifeſtly illegal*. Therefore the Judgment ought to be reverſed.

Per Cur.

JUDGMENT REVERSED.

Rex

* Rex *verſ.* Inhabitants of Weyhill.

Wedneſday 6th *February* 1760.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT CASES, p. 491. N°. 157.

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* Rex *verſ.* Spragg and Another.

* P. 930.

Saturday 9th *February* 1760.

THE Defendants had been CONVICTED of a *Conſpiracy* to charge a Perſon with a *Capital* Felony: And the *Record* of Conviction had been removed up hither by *Certiorari*; but *not* the PERSONS of the Defendants. And Mr. Serj. *Davy* being ready on behalf of the Defendants, to move *in Arreſt of Judgment*;

Mr. *Gould*, *pro Rege*, objected to his going on with the Motion; For that the Defendants ought to be PERSONALLY PRESENT. And He cited the Caſe of *Rex* v. *Elizabeth Nichols*, (2 *Strange* 1227.) which was exactly the ſame Offence as this; and it was agreed "That *after* "*Conviction*, the perſonal Preſence of the Defendant is "neceſſary upon ſuch a Motion as this."

Serj. *Davy*, for the Defendants, attempted to explain away this Rule; and urged that the Defendants were ſafe * in Cuſtody already, and therefore amenable to the Juſtice * P. 931. of the Court; and offered that the Defendants Clerk in Court ſhould undertake to bring the Defendants up, at the Defendants own Expence, in Caſe the Objection ſhould not prevail.

But the Secondary of the Crown-Office, being appealed to, alledged "That the Rule was as Mr. *Gould* had aſſerted."

The COURT held this to be a fixed and invariable Rule of Practice in this Court, "That the Defendants "muſt, *after Conviction* of ſuch an Offence as this, be *pre-* "*ſent in Court*, if they would move in Arreſt of Judgment."

Serj. *Davy* finding the Opinion of the Court and the Allegation of the Secondary of the Crown-Office to be ſo directly againſt him, as to the abſolute Neceſſity of the *perſonal Preſence* of the Defendants, prayed a *Habeas Corpus* to bring

* *V. poſt pa.* 993. up their Bodies; which was granted: And He * afterwards renewed his Motion, and had the Defendants in Court.

Note—This Caſe of a CONVICTION differs from that of a SPECIAL VERDICT; where the Preſumption of Innocence may be ſuppoſed to *continue*, and therefore the perſonal Preſence of the Defendant is *not* neceſſary at the Argument of it.

Monday 11th *February* 1760.

Foxcroft et al' Aſſignees of William Satterthwaite, a Bankrupt, *verſ.* Devonſhire & al'.

THIS Matter came before the Court, upon a Motion for a *New Trial*, on the Ground of a *Miſdirection* by the Judge who tried the Cauſe.

It was an Action upon the Caſe, upon an *Indebitatus Aſſumpſit*, brought by the Plaintiffs againſt the Defendants, for Monies had, and received by the Defendants, to the Uſe of the Plaintiffs as Aſſignees of the Bankrupt. To which the Defendants pleaded the General Iſſue "That "they did not undertake *&c:*" And Iſſue was joined thereon.

The Cauſe was tried at the *Lancaſter* Aſſizes, before Mr. Juſtice *Noel*. A Verdict was found for the Plaintiffs: And the Judge declared Himſelf *ſatisfied* with the Verdict.

It was admitted at the Trial, on the Part of the Defendants, "That *Satterthwaite* was a *Trader:*" The *Debt* of
* P. 932. * the petitioning Creditor was alſo admitted; And ſo were the *Commiſſion*, and the *Aſſignment*. But they diſputed the *Act of Bankruptcy* ſuppoſed to have been committed by *Satterthwaite*.

The Action was brought for Money ariſing from the Sale of Goods conſigned by *Satterthwaite* to the Defendant *as* FACTORS for Him, (which they had long been,) and ſold by them as ſuch; Which Money was admitted to be in the Hands of the Defendants, and amounted to 5314*l.* 17*s.* 9½*d.*

The Defendants, on the other Hand, had paid ſeveral Sums of Money upon *Satterthwaite*'s Draughts, and otherwiſe, to his Uſe and upon his Account.

The Plaintiffs, at the Trial, proved ſome *ſecret* Acts of Bankruptcy, by his being denied to his Creditors about *Chriſtmas* 1751: After which, He appeared again publickly as uſual, till about the Month of *Auguſt* following; (as was proved

proved on the Part of the Defendants.) In *Auguſt* 1752, He totally ſtopt Payment; And thereupon, the Commiſſion was taken out. The *ſecret Acts of Bankruptcy*, at *Chriſtmas* 1751, *over-reached the Conſignment* to the Defendants, the *Sale*, and the *Time when the Money was advanced* by them to the Uſe and Order of the Bankrupt. And the Counſel for the Plaintiffs produced a Series of * Letters from the Defendants to *Satterthwaite*, which fully proved, as they alledged, "That the Defendants were *privy to his* "*Inſolvency* at the *Time* when they advanced the Money to "his Uſe and Order."

* See theſe Letters *verbatim poſt* pa. 938, 939.

The Counſel for the Defendants would, at the Trial, have entered into the following Points; *viz.* 1ſt. Whether the Defendants were not intitled, *as* FACTORS for *Satterthwaite*, to *retain* for the *General Balance* of their Account: 2dly. Whether they were not within the *Protection of the Statute* of 19 *G.* 2. *c.* 31. § 1. Which, after reciting "that Bankrupts frequently commit *ſecret* Acts of "Bankruptcy *unknown* to their Creditors and other Perſons "with whom, in the Courſe of Trade, they have Dealings "and Tranſactions; and after the Committing thereof, "*continue* to appear publickly and carry on their Trade "and Dealings *&c*;" And after reciting "that the per-"mitting ſuch *ſecret* Acts of Bankruptcy to avoid and de-"feat Payments *really and bonâ fide* made in the Caſes "and under the Circumſtances before mentioned, where "the Perſons receiving the ſame *had* NOT *Notice of or* "*were privy to* ſuch Perſon's having committed any Act of "Bankruptcy, would be a great Diſcouragement to Trade "and Commerce, and a Prejudice to Credit in general;" "enacts that No Perſon who ſhall be *really and bonâ fide a* "*Creditor* of any Bankrupt, for or in reſpect of any *Bill or Bills of Exchange really and bonâ fide* drawn negociated or * accepted by ſuch Bankrupt, in the *uſual and ordinary Courſe of Trade and Dealing*, ſhall be liable to *refund or repay* to the Aſſignees of ſuch Bankrupt's Eſtate, any *Money* which before the *ſuing forth* of ſuch Commiſſion was *really and bonâ fide* and in the *uſual and ordinary* Courſe of Trade and Dealing, *received by ſuch Perſon of any ſuch Bankrupt*, before ſuch Time as the Perſon receiving the ſame ſhall *know underſtand* or *have Notice* "that He is *become* a "Bankrupt or that He is in *inſolvent Circumſtances*."

* P. 933.

But the Counſel for the Plaintiffs objected "That this "Tranſaction of the Defendants was PRAUDULENT; "For that they plainly *knew* and were *apprized* that *Sat-*"*terthwaite was inſolvent* at the *Time* when the Effects "came to their Hands."

The Jury were of this Opinion; and gave a Verdict for the Plaintiffs, for the *whole* Money, except *Commiſſion* and *Charges of Sale*.

This *previous* Point concerning the FRAUD having been ſtrongly inſiſted upon by the Counſel for the Plaintiffs, at the Trial, the Counſel for the Defendants were thereby precluded from entering into *other* Points which they thought to be material for their Clients, and which they ſaid they were otherwiſe ready to have entered into at that Time. Upon this Preclusion they grounded their preſent motion for a new Trial: For they alledged that the Jury had founded their Verdict upon *wrong Concluſions* drawn from the Evidence, and upon a *Miſtake of the Law*; and that the Defendants had been unjuſtly precluded from entering into the two preceding Points, or any Thing elſe that might have been material to their Defence.

And they now inſiſted, 1ſt. That the Defendants had a GENERAL *Lien*, as *Factors*, upon the Bankrupt's Goods conſigned to them; 2dly. That they were *Purchaſers* of them for a *valuable Conſideration*, *without Notice* that *Satterthwaite* was become a Bankrupt or in inſolvent Circumſtances; 3dly. That in *this* Action (upon an *Indebitatus Aſſumpſit*,) it is not in the Power of the Aſſignees, to affirm the Contract *in part*, and deny it *in part*; But if they *affirm it in part*, they affirm it *in toto*. Now here, they *do affirm it in part*; They affirm part of their Conduct, *as Factors*: Therefore they *can not diſaffirm* the Reſt of their Conduct *as Factors*.

They ſaid that the preſent Verdict would not ſtand in their Way: Becauſe FRAUD is a *Concluſion* of LAW, from Facts: And therefore the *Court*, and *not the Jury*, are the *proper Judges* "*What* Facts do import Fraud," and "*What* "Facts do not import Fraud." And they denied that the Letters or any part of the Facts given in Evidence were at all *unfair*: At leaſt, it could never be ſaid, "that they ſup-"ported a Concluſion of FRAUD."

* P. 934. *This Caſe was argued on *Thurſday* 24th of *January* laſt, by Mr. *Norton* for the Plaintiffs, who ſhewed Cauſe againſt ſetting aſide the Verdict and granting a New Trial upon Payment of Coſts; and by Mr. *Winne contra*, for the Defendants, who had moved for a New Trial.

The COURT having taken Time to conſider it—

Lord MANSFIELD now delivered their Reſolution.

This Matter came before the Court, upon a Motion for a *New Trial*, on the Ground of a *Miſdirection* by the Judge who tried the Cauſe.

It

It was an Action upon the Caſe upon an *Indebitatus Aſſumpſit*, for Monies had and received by the Defendants, to the Uſe of the Plaintiffs as Aſſignees of the Bankrupt. The Defendants pleaded the General Iſſue. And the Cauſe was tried at *Lancaſter* Aſſizes, before Mr. Juſtice *Noel*.

It was admitted at the Trial, That *Satterthwaite* the Bankrupt was a Trader: And the Debt of the petitioning Creditor, the Commiſſion and the Aſſignment were likewiſe all admitted.

The Action was brought for Monies ariſing from the Sale of Goods which had been conſigned by the Bankrupt, to the Defendants as Factors for Him, and ſold by them as ſuch; which Money was admitted to be in the Defendants Hands, and amounted to 5314*l.* 17*s.* 9½*d.*

It appeared that the Defendants had paid ſeveral Sums of Money to *Satterthwaite*'s Uſe, upon Bills drawn upon them by Him, and otherwiſe.

The Plaintiffs (the Aſſignees under the Commiſſion) *proved ſome* SECRET *Acts of Bankruptcy* to have been committed by *Satterthwaite* about *Chriſtmas* 1751; namely, his being denied to his Creditors. On the other Side it was proved that He ſoon *appeared again publicly, as uſual*; and continued to do ſo, till about the Month of *Auguſt* following, (1752.) But in *Auguſt* 1752, He ſtopt Payment: And thereupon, the Commiſſion was taken out.

Theſe ſecret Acts of Bankruptcy committed at *Chriſtmas* 1751, *over-reached the Conſignment* of the Goods, the *Sale* of them, the *Receipt* of the Monies for which they were ſold, and likewiſe the *Time when the Defendants advanced the Monies* to the Uſe and Order of the Bankrupt.

* It was inſiſted by the Counſel for the Defendants, That from the Nature of the preſent Action, an *Indebitatus Aſſumpſit*, the Defendants, being FACTORS, ought to be allowed not only for their Commiſſion and all Charges and Expences, but alſo *whatever Money they had paid on Account* of BILLS *drawn upon them by Satterthwaite*; And that the Plaintiffs in this Action could only recover the BALANCE of the *general* Account. * P. 935

The Counſel for the Plaintiffs admitted that the Defendants were intitled to be allowed their *Commiſſion* and all *Charges* and *Expences*, as Factors; but *not the Bills of Exchange* drawn by *Satterthwaite*, which they had paid *ſubſequent* to the *Act of Bankruptcy*.

THIS

THIS *Queſtion* was agreed to be *reſerved*, (if it ſhould be neceſſary to have Recourſe to it,) as a Point for the future Conſideration and Determination of the Judge who tried the Cauſe.

But the Counſel for the Plaintiffs inſiſted on a *Preliminary* Point; *viz.* "That the Defendants were guilty of a "FRAUD, in paying theſe Bills of Exchange drawn upon "them by the Bankrupt:" Which *Preliminary* Point of FRAUD was ſufficient to *deſtroy* any Right that the Defendants might *otherwiſe claim* (ſuppoſing the Tranſaction had *not* been fraudulent,) *to an Allowance of the Money paid in diſcharge of them*; and, conſequently, to *preclude* them *from entering at all* into *the Queſtion abovementioned*. For if it ſhould be admitted on the Part of the Plaintiffs, "that "this Action of *Indebitatus Aſſumpſit* affirmed the Contract," Yet if their Payment of the Bills was *fraudulent*, it would at once put an End to their Claim of an Allowance of the Money as *fraudulently* paid. They granted that in Caſe the Defendants ſhould appear *not* to have been guilty of any Fraud, but to have paid the Bills fairly and honeſtly, they would then have a Right to enter into the Point reſerved (as above) for future Conſideration: But they inſiſted, that upon Suppoſition that in a *Common* Caſe, this Sort of Action *would confirm the Contract*, ſo as to make Conſignment, Sale, and Payment of the Bills to be conſidered as *before* any Act of Bankruptcy committed; and conſequently, that the Defendants would be *intitled to retain what they had paid upon the Bills*; (For every thing that could be alledged by the Defendants, muſt, *pro hac vice*, be *admitted*, upon a previous Bar to their going into the Queſtion;) Yet the Bar of FRAUD would *deſtroy* any Demand they could have upon that Account.

And the FRAUD which they *charged* upon the Defendants was this, "That they were PRIVY to *Satterthwaite*'s "Inſolvency, at the *Time* when they advanced the Monies "to diſcharge his Bills."

* P. 936. * Upon this *preliminary* Point *only*, of FRAUD, It was left to the Jury: And upon *this* Point *only*, they found their Verdict. Upon hearing all the Evidence, They were, of Opinion "That the Tranſaction *was fraudulent* on the "Part of the Defendants:" And they gave a Verdict for the Plaintiffs, for the whole Money; deducting only the Commiſſion due to the Defendants, and the Expences of the Sale of the Goods.

THOUGH the *Ground* of the Verdict ſhould be wrong, Yet if it clearly appeared to Us *now*, "That, upon the "whole, *no Injuſtice* had been done to the Defendants; or if it clearly appeared to Us *now*, "That the Plaintiffs, "by *another Form of Action*, could recover all they have "got

" got by this Verdict ;" We think the Court ought not to grant a new Trial. But if *Injuſtice* be done to the Defendants by the preſent Verdict ; and if it be *not* certain and clear " that the Plaintiffs might have equal redreſs, and re-" cover as much, by *another Form of Action* ;" then We ought to grant a new Trial.

Two Points have been argued, and urged on the Part of the Plaintiffs—

1ſt. That clearly the Defendants were not to be allowed to retain for the Bills : Becauſe (1ſt.) They were not paid till *after* an Act of Bankruptcy ; (2dly.) *This* Action (of *Indebitatus Aſſumpſit*) only admits the Sale of the Goods, and Nothing elſe but the Agency of the Defendants in *that ſingle* reſpect ; and (3dly.) *If* it admitted every Thing, ſo as to put the Aſſignees in the very Condition the Bankrupt would have been, had he brought this Action, Yet a *Factor* has *no Lien* for Items of a * *general* Account, (his Lien being confined to his *Commiſſion* and *Expences* about the particular Goods.) 1ſt Collateral Point. * *V. ante* 494.

Theſe Points have not been at all conſidered in this Action : And therefore it is enough, if they are *doubtful*. They went off, upon the preliminary Queſtion of the *Fraud* being taken up and purſued ; and were never afterwards taken into any further Conſideration, at the Trial.

We are not clear that this Action of *Indebitatus Aſſumpſit* does not affirm the Power of the Bankrupt and the Contract, throughout the *whole* Tranſaction. Where ſuch an Action is brought by Aſſignees of a Bankrupt's Effects againſt a *Vendee* of Goods, It affirms the Sale, and alſo the *Payment to the Bankrupt* of any Part of the Price. It is agreed here, that it admits the *Conſequence* of the Defendants being Factors ; and allows a Lien for *Commiſſion* and *Expences*.

" That a *Factor* has alſo a *Lien* upon Goods conſigned, " (*whilſt* they *remain in Poſſeſſion*,) for Items of a *general* " * Account with his Principal," has been † ſolemnly determined. However the preſent Caſe differs from the Caſe of *Krutzer* v. *Wilcocks*, where it was ſo determined. For there, the Factor *remained in Poſſeſſion of the Goods* : But here the Goods have been *ſold*, and turned into *Money*. In *ſuch* a Caſe, there never was a Doubt but that *mutual Items* of Account *might be ſet off* : The Demand and Recovery can only be for the Balance. Therefore it is impoſſible to ſay, that the Queſtion the Defendants would have made upon this Point, had they been permitted, *may* not be very material. And if it *might* have been material to their Defence, they have a Right to have it tried and conſidered. * P. 937. † In the Caſe of *Krutzer* v. *Wilcocks*.

2dly.

2d Collateral Point.

2dly. Another Matter gone into at the Trial, and urged by the Counſel for the Plaintiffs, was, "That in an *Action* "*of* TROVER, the Plaintiffs might certainly recover the "Value of the Goods, without making *any Allowance*."

Mr. *Winn* convinced me, That it would depend upon a Variety of Circumſtances, (ſome of which he offered to lay before Us by Affidavit) which were not gone into at the Trial, becauſe the Counſel for the Defendants were ſtopped and cut ſhort, by the Preliminary Bar of the Fraud, which was alone ſufficient to invalidate their Claims as upon a fair Tranſaction.

I do not chooſe to ſay more particularly what may poſſibly aſſiſt the Defendants in an Action of Trover; becauſe I would not prejudice the Matter: It is enough to ſay, "It "does not ſufficiently appear to Us, that they could make "*no* Defence to an Action of Trover."

Principal Point.

This makes it neceſſary to examine the GROUND *of the Verdict*, which proceeded from the Direction given.

I will admit "that the Evidence proved the Fact and "every Concluſion deducible from it;" But I cannot think that the Fact ſo proved, or Concluſion ſo drawn, amounts to that Offence which the Law calls FRAUD, to avoid the Debt. And in examining this Matter, We muſt remember, that, *pro hac vice*, the whole Tranſaction is admitted to be *before* any Act of Bankruptcy.

Mr. *Norton* rightly ſaid, "That *Fraud* is *ſometimes* mere "Matter of Fact; and *ſometimes*, the Concluſion of Law "from Facts."

So is High Treaſon. Levying War is mere Matter of Fact; Compaſſing the Death of the King is a legal Concluſion from Facts. So it is, almoſt, as to every other Offence.

* P. 938.

* *Fraud* often is a *mere Fact*; as when it depends (as on a Policy of Inſurance, for Inſtance,) upon what the Party ſaid or did: Or It may be, and often is a Queſtion of *Law*.

Suppoſe a Creditor, *knowing* a Trader likely to break, *conceals* it from the Knowledge of other Creditors, till He gets, even by Threats of legal Proceſs, Payment of his Debt *before* any direct Act of Bankruptcy; and the Aſſignees ſhould inſiſt this was a Fraud, and that he ſhould refund: This is a Matter of *Law*; And the *Law* would ſay "that this was "*not* fraudulent."

Suppoſe

Suppoſe a Man *bonâ fide*, lends Money to a Trader, upon a *Mortgage*, after an Act of Bankruptcy, *without* Notice; and *then knowing* of the Commiſſion of Bankruptcy and Aſſignment, gets in an old Term, even for little or no Conſideration; And the Aſſignees bring an Ejectment; And it becomes a Queſtion "Whether this be a Fraud or not;" This is a Matter of *Law:* And the Law will ſay "It is *no* "Fraud;" For the Mortgagee had a Right to do this.

The Evidence of Fraud in *this Caſe*, as ſtated by the Report, are the following Letters—The firſt is dated, *Briſtol*, 5*th May* 1752, Signed "*Devonſhire* and *Reeves*," and directed to *William Satterthwaite*. "We wiſh you had been "*open*, and *told us in Time* how Your Affairs ſtood—It ap- "pears to us very evidently, you have riſqued your Repu- "tation and Credit on the Faith of thoſe *S*. Do but conſider "where You muſt have been in Point of Reputation, had "We done otherwiſe than we did—It is now over; and we "will not do any Thing that ſhould leſſen your Credit— "Therefore ſhip not an Ounce of Goods more, till your "Affairs are ſettled."

The next Letter is dated *Briſtol*, 15*th May* 1752, Signed "*Devonſhire* and *Reeve*," and directed to *William Satterthwaite* Merchant in *Briſtol*; and contains the following Paſſage—"We can not help being *uneaſy* to think you have "drawn on Us again for 120*l*. Really You will make Us "let your Bills *go back proteſted*, in ſpight of our Inclina- "tions. We will pay this; but take Notice—*don't draw* "*another:* We friendly hint it."

The next Letter is dated 25*th June* 1752, ſigned and directed as above; and is thus—"*William Satterthwaite*, * "Eſteemed Friend—We really *fear* theſe Proceedings will "*greatly hurt your Credit* in the Eyes of every judicious "Perſon: It is very natural to think, that will be the Con- "ſequence. For our Part, we would make a thouſand "Shifts, rather than triſle with our Reputation, as you do "with Yours—It's a Matter well worth your ſerious Con- "ſideration.

* They were Quakers.

* "*P. S.* Incloſed We return You *Liebenrood*'s Draft 150*l*. "which, with one Shilling Poſtage, place to our Credit. "This is ſuch a Thing we never did before, nor ever will "again."

* P. 939.

The next Letter is dated 27th *June* 1752, ſigned as before, and directed to *William Satterthwaite*. After referring to the laſt, it goes on thus—"In this laſt Letter, * Thee men- "tioneſt nothing of remitting for *Liebenrood*'s Bill, which "Thee ordered us to ſend for from *London* 4 Days before "due, (which we did, and returned thee in our laſt,) tho'

* *V.* the Note on laſt Letter.

"Thee

" Thee promiſed Us faithfully to remit for the ſame, laſt 6th " Day was a Week: And having had ſundry Letters that " take no Notice thereabout, We can not help thinking and " ſaying that thee *trifles with thy Creditors and Us.* We are " ſo much in Want of Money *as thee canſt poſſibly be*; and " had we thought, Thee wouldſt have treated us in this " Manner, We would not have advanced one Quarter of " the Sum, to be allowed 10*l. per Cent.* The Diſappoint- " ment to Us gives more Uneaſineſs than all the Profits of " a Year's Trade will do Us."

The next Letter is dated 14th *July* the ſame Year, and ſigned as before; And is as follows—" *William Satter-* " *thwaite*, Eſteemed Friend, So much for your Affairs in " and under our Care; Which ſhall be managed with all " Care and Frugality.

" But what next We ſay, *appears to us in a very odd light* " —For *Edward Wilcox* has been with us, and ſays you " have *made over our Goods* on the *Sarah* and *Martha*. If " true, gives us *ſuch Ideas that we dare not put Pen to Pa-* " *per to ſay our Sentiments*. If you ſend Us any more Bills " —If ever We do return a Bill, We *will return your's.*"

The next Letter is the 28th *July* the ſame Year, ſigned as before, and is as follows—" *William Satterthwaite*,— " The *Sarah* and *Martha*, your $\frac{3}{8}$ths. The *Carolina*, how " much? Tell Us: For *you muſt ſecure Us, by a Bill of Sale* " *of Each*,—that is your Parts,—unleſs you ſend here ſome " *Security*.—Say, your Father *Moſs*—join in a Bond, or " ſome good Man. Claimants will be made upon Us, for " their Proportions of Cargoes We have ſold; as *Touchetts* " did of the Rice. We are willing to ſtand by You as far " as We can with Prudence: but *an undoubted Counter-Se-* " *curity we muſt have*—We *dread the Conſequences* of theſe " repeated Strokes—We *very much ſuſpect*, *You have not* " *the Money*—We *muſt have your Affairs cleared up.* What- " ever *you* are, *We are almoſt broken-hearted, to ſee how* " *you are going on*, and *have of late.* And what will be " the Conſequence, if you are worth 3000*l.*? We know, " and have ſeen the Conſequence elſewhere.

* P. 940. * *Some vague Suſpicions* beſide, have been mentioned at the Bar, by the Counſel for the Plaintiffs: as, that they were All of them Quakers, and endeavouring to play into Each other's Hands, to the Prejudice of *Satterthwaite*'s other Creditors; That *Satterthwaite* had broke before; That all the Bills were after *May*; (which the Other Side denies.)

But as I proceed upon *allowing* the Evidence to *prove* the Concluſions contended for, It is only neceſſary to examine what thoſe *Concluſions* are. The Report ſays, that " a falſe

" a falſe Credit was given the Bankrupt:" *i. e.* He would have broke openly, unleſs they had lent him Money. The Counſel for the Plaintiffs ſay, the Defendants lent him Money, to keep him from failing, *till* his Ships and Goods might come Home, conſigned to Themſelves, or even to the Bankrupt's own Hands: Whereas if a Commiſſion had iſſued *before* that Time, the *Aſſignees* would have had them.

It was left to the Jury, That if they believed, from the Evidence, that the Defendants *knew* or *underſtood* the Bankrupt's Circumſtances to be *inſolvent* at the *Time* they paid his Bills; they might find againſt them, *upon the Ground of* FRAUD. And they found in the Affirmative.

Had the Queſtion turned upon the Validity of a Payment made *after* an Act of Bankruptcy committed, within the * Act of 19 *G.* 2. *c.* 32. (which was One of the Points made at the Trial,) the Direction would have been quite agreeable to the Terms of that Act. But, as the Queſtion was, " Whether, ſuppoſing the whole Tranſaction *before* " any Act of Bankruptcy committed, the Defendants were " to be excluded from claiming Satisfaction for the Money " they had advanced upon *Satterthwaite*'s Bills, by Reaſon " of their Fraud in advancing it;"—We all are of Opinion " that the *Direction was a* MISTAKE."

* *V.* §. 1.

It is NO *Fraud*, for a Factor, *knowing* the Circumſtances of his Principal to be deſperate, and *believing* that he muſt break unleſs he can procure Credit, to *advance Money* upon his Bills, *to ſave him from an Immediate Failure.* On the Contrary, it is an honourable, friendly, and generous Act. *No Prejudice* can ariſe but to the *Lender* Himſelf. *He* may loſe the Whole, or the greateſt Part of the Money ſo advanced: But the *Principal*'s Eſtate, if he breaks, is by ſo much a *Gainer*; or *ſome particular Creditors*, to whom this Money has been *paid*, are *Gainers. If*, by this Aſſiſtance, the Principal has the good Luck to *ſtand his Ground*, He and *all* his Creditors are *benefited:* But *none* of his Creditors can *ſuffer* by the Advancement of Money to their Debtor. Many beneficial Inſtances of this kind have ſaved the moſt conſiderable Houſes from Ruin.

* *If* the Factor truſts that Effects of his Principal will come over from abroad conſigned to him, by which Means he may *acquire a Lien* upon them for his Reimburſement, the Factor's Conduct is a little more prudent: But ſtill it is free from all Colour of *Fraud.* It is the *uſual Method* of Dealing between Principals and Factors in *good* Credit; the latter advance Money upon the Faith of Conſignments: But when a Factor, knowing his Principal to be in *great Diſtreſs*, and in *immediate Danger of failing*, advances Money

* P. 941.

Money upon the *Faith* " that Effects beyond Sea *will* come " over conſigned to him," He acts *meritoriouſly*.

The richeſt Man in Trade may be ruined, while his Effects are abroad, and not in his own Power, to anſwer immediate Demands upon Him; (which was the Caſe of the *Woodwards*, who could not ſave themſelves from failing, though they had ſufficient to pay 30 *s.* in the Pound.) But the Factor may actually ſave him by this Aſſiſtance, till they come home: and yet the Factor himſelf runs a great Riſque, and truſts to a *precarious* Security. For the Goods may in Fact be conſigned originally to *Another*; Or The Conſignment to him may be *countermanded:* They may be ſold. They may be *mortgaged*, or *burnt*, or *loſt*, and never come into his Poſſeſſion ſo as to give him any Lien: And it appears by the Letters that have been read, that in this very Caſe, *Satterthwaite* unworthily made over to other Perſons part of the Goods to which the Defendants had truſted for their Security.

A *Mortgage* of Ships abroad, or of Cargoes upon the high Seas, by a Trader, to any Body, is *good*, notwith-
* Sect. 11. ſtanding the Clauſe in * 21 *Jac.* 1. *c.* 19. though Poſſeſſion has not been actually delivered: For a Bill of Sale is all the Poſſeſſion that can be delivered till the Ship comes Home.

There ſcarce happens a Bankruptcy in which it does not appear that a fictitious Credit has been acquired by drawing and redrawing Bills of Exchange, and by Accepting and Indorſing Promiſſory Notes: Yet there never was a Doubt, but that the Perſons lending their Names, by which they render themſelves at laſt liable, may come in as Creditors. The Caſe of a Man who has *actually paid his Money* to ſupport the Credit of another, is infinitely ſtronger than that of lending a Name only, without advancing any Money at all.

There cannot be a greater Paradox, than that a Man ſhould be guilty of a *Fraud*, in lending his Money with *no other Proſpect* but the *Chance* of being repaid it.

* P. 942. * A Notion " that Lending Money to Traders, knowing " them to be in dubious, tottering, or diſtreſſed Circum- " ſtances, upon Mortgages or Liens, is fraudulent; and " conſequently the Contract void in Caſe a Bankruptcy en- " ſues;" would throw all mercantile Dealing into inextricable Confuſion. Men lend their Money to Traders upon Mortgages or Conſignments of Goods; *becauſe* they ſuſpect their Circumſtances, and will not run the Riſque of their general Credit.

Though We have All been clearly of Opinion, " that " no Concluſion attempted to be drawn from the Evidence " in this Caſe, allowing it to be true, amounted in Point of " Law to the Offence of *Fraud*, and a Forfeiture of the " Debt on *that* Account ;" Yet I have ſo great a Regard for the Authority of my Brother *Noel*, (whoſe Knowledge and Experience is as great, and his Opinion of as much Weight, as any Man's, both in Courts of Law and Equity,) that I was deſirous to talk the Matter fully over with him ; which I have done.

He ſays, the Point upon which the Defendant's Caſe is now put, and which was reſerved for his Opinion if it ſhould be neceſſary, was not explained, or underſtood at the Trial as it is now : And the Queſtion of Fraud was intangled by not diſtinguiſhing this Caſe from that of a Factor having Goods in his Poſſeſſion conſigned to him before an Act of Bankruptcy ; and *after Knowledge* of an Act of Bankruptcy, advancing Money to the Bankrupt, with a View of covering the Effects and playing them into his own Hands, in Oppoſition to the Bankrupt's Aſſignees.

But in this Caſe, where the Factors did not know of the Act of Bankruptcy, He is now fully convinced that the Facts did *not* amount to *Fraud*, and that the Jury ſhould have been ſo told ; And concurs in Opinion, that there ſhould be a *new Trial*.

If We ſhould not grant it, the Precedent of * *Villain* v. *Hyde* muſt be followed ; where a Bill in Chancery was brought by the Defendant at Law in an Action upon an *Indebitatus Aſſumpſit*, becauſe Allowances, which ought in Juſtice to have been made to Him at the Trial, were not made. Lord *Hardwicke* was, in that Caſe, under great Difficulties how to proceed, upon ſuch a Ground, to give Relief in Equity : But the ſtrong Juſtice of the Caſe prevailed upon Him to ſhew ſuch a Diſpoſition, as induced the Aſſignees to conſent to the Allowance, and make a Satisfaction agreeable to the real Juſtice of the Caſe.

* In Chancery, *M.* 1749.

* We are all of Opinion that the Rule be made abſolute for a NEW TRIAL : But the new Trial muſt be upon *Payment of* COSTS. * P. 943.

RULE made ABSOLUTE, for a *New Trial* Upon Payment of Coſts.

N. B. The Aſſignees acquieſced ; and never tried the Matter again, in this Action, nor brought any Other.

Rex

Rex *verſ.* Turkey Company.

MR. *Norton* moved, on *Wedneſday* laſt, for a *Mandamus* to admit Mr. *Iſaac Rogers* into their Company; He having tendered 20*l.* as the Act directs, and to make his *Affirmation* purſuant to the Directions of the late Act of Parliament made relating to that Company, 26 *G.* 2. *c.* 18.

The only Reaſon of his being refuſed, was, That he declined to take the *Oath* preſcribed by that Act. Whereas Mr. *Norton* alledged, that as Mr. *Rogers* was a *Quaker*, his *Affirmation* was ſufficient: For which, He cited the Statute of 22 *G.* 2. *c.* 46. * "for allowing Quakers to make an "Affirmation, in Caſes where an Oath is *or ſhall* be re-"quired."

*V. §penult. & ult.

Mr. *Harvey* offering now to ſhew Cauſe—

It was agreed by the COURT and Counſel on both Sides, That this was a proper Matter to come before the Court by way of *Return* to a *Mandamus*, rather than upon *Motion*. Wherefore the

RULE for a MANDAMUS
was made abſolute. *V. poſt, pa.* 999.

The End of *Hilary* Term 1760.

Eaſter

* Eaſter Term

* P. 944.

33 Geo. 2. B. R. 1760.

Fletcher *verſ.* Hennington.

Friday 2d *May* 1760.

THIS was an Action of Debt, on a Bond conditioned for Payment of Money *on* OR *before* ſuch a Day. The Defendant (having prayed Oyer of the Condition) pleaded Payment at a Day *before* the particular Day ſpecified for Payment of it. The Plaintiff demurred to this Plea, as offering an *immaterial Iſſue*. The Defendant joined in Demurrer.

Mr. *Howard* (who was Counſel for the Plaintiff) prayed Judgment for the Plaintiff; as this Iſſue might be quite immaterial, if found for the *Plaintiff*; ſo that the Plaintiff could not have Judgment upon ſuch a Finding: (though indeed it would be a material One, if found for the Defendant; as Payment before the Day, would be Payment *at* the Day.) The Defendant ought to have pleaded it as Payment *at* the Day: For Payment before the Day is, in point of Law, Payment at the Day.

Mr. *Aſpinall contra*, for the Defendant, admitted that this Reaſoning would hold in Caſes of Money made payable, by the Condition, at and upon a *fixed* certain Day: But the Caſe, He ſaid, was quite different, where the Money is made payable at *or before* ſuch a Day; which is the *preſent* Caſe. To prove which, He cited the Caſe of * *Tryon* v. *Carter*, *M.* 8 *G. B. R.* where Lord *Hardwicke* laid down the Rule of pleading to an Action of Debt upon Bond with a Special Condition to be, "That wherever "the Defendant pleads *a Performance* of the Condition, "the Plaintiff muſt aſſign an abſolute Breach; though this "be not neceſſary where he pleads a *collateral* Matter (as "a Releaſe.")

* There is an imperfect Note of this Caſe in 2 *Strange* 994.

And

And the COURT agreed to this Diſtinction; and ſaid that the proper Method, in Caſes where the Money is made
* P. 945. * payable "at *or before* ſuch a Day," was to plead, as is done here, (if the Fact was ſo,) "that it was paid at ſuch "*precedent* Day." And then, if the Plaintiff diſputes the Reality of any Payment at all, he may reply "That it "was not paid at the particular Day mentioned in the Plea, "*nor at any Time before or after that Day:*" And this will bring the Point to the material and proper iſſue, "Whether "it has been ever paid at all, or not."

They held, conſequently, That the Plaintiff, in the preſent Caſe, ought to have *replied*, and *not* to have *demurred*.

Whereupon, Mr. *Howard* prayed a Day or Two's Time, to move to withdraw his Demurrer, and reply to the Defendant's Plea.

Which was granted.

Saturday 3d *May* 1760.

Rex *verſ.* Inhabitants of Chriſtchurch.

See this CASE *abridged*, in the TABLE; and *at large* in the Quarto-Edition of my SETTLEMENT CASES, N°. 158. p. 494.

Johnſon

* Johnſon and Another, Aſſignees of Hargreaves a Bankrupt, *verſ.* Smith, Widow, Executrix of Thomas Smith, her late Huſband. * P. 950. *Tueſday* 6th *May* 1760.

Hil. 33 *G.* 2. *Rot'lo* 24.

THIS was an Action upon the Caſe upon *Aſſumpſit*, brought by the Aſſignees of the Bankrupt's Eſtate and Effects, for 200*l.* for Goods ſold and delivered by the Bankrupt (before his becoming ſo) to the Defendant's Teſtator, in his Life-time.

It came before the Court, upon a Demurrer to the Defendant's Rejoinder: And it is neceſſary to ſtate the Pleadings particularly; becauſe a great Part of the Argument turned upon them.

The Action was laid in *Lancaſhire*: And there was nothing extraordinary in the Declaration. It was a Common and Uſual Declaration, containing ſeveral Counts. The firſt Count was—For that Whereas the Defendant's Teſtator *Thomas Smith* in his Life-time, before the ſaid *Richard Hargreaves* became a Bankrupt, to wit, on the *firſt Day of January in the Year of our Lord* 1753, at *Preſton* in the ſaid County, was indebted to the ſaid *Richard Hargreaves* in 200*l.* of lawful Money of *Great Britain*, for divers Goods Wares and Merchandizes by the ſaid *Richard Hargreaves* before that Time ſold and delivered to the ſaid *Thomas* at his Special Inſtance and Requeſt; And being ſo indebted, He the ſaid *Thomas* in Conſideration thereof, afterwards in his Life-time, to wit, On the *ſame Day* and Year aforeſaid, at *Preſton* aforeſaid, undertook and to the ſaid *Richard Hargreaves* before He became a Bankrupt *then* and there faithfully promiſed to pay to Him the ſaid 200*l.* when He the ſaid *Thomas* ſhould be afterwards thereunto requeſted; And whereas *&c.* (This Count is upon a Promiſe to pay what they were reaſonably worth, and an Averment of their being worth 200*l.*) Nevertheleſs the ſaid *Thomas*, in his Life-time, and the ſaid *Mary* (the Defendant) ſince his Deceaſe, hath not nor hath Either of them paid *&c.* There were two Other like Counts, differing only in this, that they laid the Promiſe to be on 1*ſt March* 1756; and charged the Debt to be due, and the Promiſes made *to the Aſſignees*, (not to *Hargreaves* Himſelf.) Declaration.

The Defendant, having Leave to plead ſeveral Pleas, firſt pleads "that her Teſtator did not, in his Life-time, "undertake and promiſe, in Manner and Form *&c.*" And upon this, Iſſue is joined. 1ſt Plea.

And the COURT agreed to this Diſtinction; and ſaid that the proper Method, in Caſes where the Money is made
* P. 945. * payable "at *or before* ſuch a Day," was to plead, as is done here, (if the Fact was ſo,) "that it was paid at ſuch "*precedent* Day." And then, if the Plaintiff diſputes the Reality of any Payment at all, he may reply "That it "was not paid at the particular Day mentioned in the Plea, "*nor at any Time before or after that Day*:" And this will bring the Point to the material and proper iſſue, "Whether "it has been ever paid at all, or not."

They held, conſequently, That the Plaintiff, in the preſent Caſe, ought to have *replied*, and *not* to have *demurred*.

Whereupon, Mr. *Howard* prayed a Day or Two's Time, to move to withdraw his Demurrer, and reply to the Defendant's Plea.

Which was granted.

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It came before the Court, upon a Demurrer to the Defendant's Rejoinder: And it is neceſſary to ſtate the Pleadings particularly; becauſe a great Part of the Argument turned upon them.

The Action was laid in *Lancaſhire*: And there was nothing extraordinary in the Declaration. It was a Common and Uſual Declaration, containing ſeveral Counts. The firſt Count was—For that Whereas the Defendant's Teſtator *Thomas Smith* in his Life-time, before the ſaid *Richard Hargreaves* became a Bankrupt, to wit, on the *firſt Day of January in the Year of our Lord* 1753, at *Preſton* in the ſaid County, was indebted to the ſaid *Richard Hargreaves* in 200*l.* of lawful Money of *Great Britain*, for divers Goods Wares and Merchandizes by the ſaid *Richard Hargreaves* before that Time ſold and delivered to the ſaid *Thomas* at his Special Inſtance and Requeſt; And being ſo indebted, He the ſaid *Thomas* in Conſideration thereof, afterwards in his Life-time, to wit, On the *ſame Day* and Year aforeſaid, at *Preſton* aforeſaid, undertook and to the ſaid *Richard Hargreaves* before He became a Bankrupt *then* and there faithfully promiſed to pay to Him the ſaid 200*l.* when He the ſaid *Thomas* ſhould be afterwards thereunto requeſted; And whereas *&c.* (This Count is upon a Promiſe to pay what they were reaſonably worth, and an Averment of their being worth 200*l.*) Neverthleſs the ſaid *Thomas*, in his Life-time, and the ſaid *Mary* (the Defendant) ſince his Deceaſe, hath not nor hath Either of them paid *&c.* There were two Other like Counts, differing only in this, that they laid the Promiſe to be on *1ſt March* 1756; and charged the Debt to be due, and the Promiſes made *to the Aſſignees*, (not to *Hargreaves* Himſelf.) Declaration.

The Defendant, having Leave to plead ſeveral Pleas, firſt pleads "that her Teſtator did not, in his Life-time, "undertake and promiſe, in Manner and Form *&c.*" And upon this, Iſſue is joined. 1ſt Plea.

* P. 951. * And for further Plea, She ſays " That the ſaid *Thomas Smith did not promiſe or undertake*, in Manner and

2d Plea. " Form as the ſaid *William Johnſon* and *Richard Leigh* have " above complained againſt Her, at *any Time within Six* " *Years next before the Day of exhibiting the* AFORESAID " BILL *of the ſaid William Johnſon and Richard Leigh.*"

3d Plea. And for further Plea, as to the two firſt Promiſes mentioned in the Declaration, She pleads a Sett-off.

Replication to 2d Plea. The Plaintiff's reply, as to the Defendant's ſecond Plea in Bar, " That after the making of the ſaid ſeveral Promiſes and Undertakings in the ſaid Bill mentioned, and " after the ſaid *Richard Hargreaves* became a Bankrupt, " and alſo after the Deceaſe of the ſaid *Thomas Smith*, and " WITHIN *ſix Years* next after the making of the ſaid " ſeveral Promiſes in the ſaid Bill mentioned, to wit, *on* " *the 28th Day of November in the 32d* Year of the Reign " of our Lord the now King, They the ſaid *William Johnſon* and *Richard Leigh*, for the Obtaining and Recovery " of their Damages by reaſon of the Non-Performance of " the Promiſes and Undertakings in the ſaid Bill mentioned, " *ſued out* of the Court of our ſaid Lord the King before " the King himſelf, (the ſaid Court then being at *Weſtmnſter* in the County of *Middleſex*,) *againſt the ſaid Mary*, " a certain Writ of our ſaid Lord the King called a LATITAT, directed to the then Sheriffs of the City of *York*; " By which ſaid Writ, our ſaid Lord the King commanded " the ſaid Sheriffs that they ſhould take the ſaid *Mary*, " in the ſaid Writ called *Mary Smith* Widow and Executrix of *Thomas Smith* her late Huſband deceaſed, and " *John Doe*, if they might be found in their Bailiwick, " and ſafely keep them, So that the ſaid Sheriffs might have " their Bodies before our ſaid Lord the King at *Weſtminſter* " on *Tueſday* next after the Octaves of *St. Hilary* then next " following, to anſwer the ſaid *William Johnſon* and *Richard* " *Leigh* Aſſignees of the Debts Goods and Effects which " were of the ſaid *Richard Hargreaves* a Bankrupt, in a " Plea of Treſpaſs; And that the ſaid Sheriffs ſhould have " then there that Writ: Which ſaid Writ they the ſaid " *W. J.* and *R. L.* as Aſſignees in Form aforeſaid, ſued " out againſt the ſaid *Mary* as Executrix as aforeſaid, " WITH INTENT *that the ſaid Mary might be perſonally* " *ſerved with a Copy thereof* according to the Form of the " Statute in ſuch Caſe made and provided, *and that the ſaid* " *Mary might appear at the Return* of the ſaid Writ in the " ſaid Court here, at the Suit of the ſaid *Wm. J.* and *R. L.* " and that the ſaid *Wm. J.* and *R. L.* as Aſſignees in Form " aforeſaid *might thereupon exhibit their Bill* in the ſaid Court " here, againſt the ſaid *Mary* as being Executrix as afore- " ſaid, for the Obtaining and Recovery of their Damages " by Occaſion of the Non-Performance of the ſeveral Pro-

" miſes

" * miſes and Undertakings in the ſaid Bill mentioned, ac- * P. 952.
" cording to the Cuſtom of the ſaid Court here. At which
" ſaid *Tueſday* next after the Octave of *St. Hilary*, the ſaid
" *W. J.* and *R. L.* as Aſſignees in Form aforeſaid, came by
" their Attorney aforeſaid; And the ſaid *Mary* likewiſe
" came by the ſaid *T. H.* her Attorney, and appeared in the
" ſame Court here at the Suit of the ſaid *W. J.* and *R. L.*
" according to the Exigency of the ſaid Writ and the Cuſtom
" of the ſaid Court here: And thereupon the ſaid *Wm. J.*
" and *Rd. L.* as Aſſignees in Form aforeſaid, *according to*
" *their aforeſaid Intention*, in the Term of *St. Hilary* in
" the 32d Year of the Reign of our ſaid Lord the now King,
" *exhibited their aforeſaid Bill* in the ſaid Court of our ſaid
" Lord the King before the King Himſelf, againſt the ſaid
" *Mary* as being Executrix in Form aforeſaid, for the Ob-
" taining and Recovery of their Damages by occaſion of the
" Non-Performance of the ſeveral Promiſes and Undertak-
" ings in the ſaid Bill mentioned." And the ſaid *Wm. J.*
and *Rd. L.* further ſay, " That the ſaid *Thomas Smith* in
" his Life-time, WITHIN *ſix Years next before the ſuing*
" *out of the ſaid Writ called* a LATITAT, *did undertake*
" *and promiſe*, in Manner and Form as the ſaid *Wm. J.* and
" *Rd. L.* have above complained againſt the ſaid *Mary*."
And *this* the ſaid *W. J.* and *R. L.* are ready to verify:
Whereof they pray Judgment, and their Damages by reaſon
of the Non-Performance of the aforeſaid Promiſes and Un-
dertakings to be adjudged to them *&c.*

And as to the laſt Plea in Bar to the two firſt Counts, Replication
They reply " that *Hargreaves* was not indebted in Manner to 3d Plea.
" and Form as the Defendant has in that Plea alledged:"
Upon which, Iſſue is joined.

And the ſaid *Mary*, as to the aforeſaid Replication of the Rejoinder.
ſaid *Wm. J.* and *Rd. L.* to the Plea of the ſaid *Mary* ſecond-
ly above pleaded in Bar, ſays, " *That* BY THE COURSE
" AND CUSTOM OF THE COURT *of our Lord the King here,*
" *a Writ of* LATITAT *ſued out* AFTER THE END OF ANY
" TERM *is* SUPPOSED *to have iſſued out of the ſaid Court*
" *here* WITHIN *the Term then* PRECEDING." But the ſaid
Mary further ſays, " That the *ſaid Writ of Latitat* in the
" aforeſaid Replication *mentioned was* REALLY AND TRULY
" *ſued out of the ſaid Court here, by them the ſaid William and*
" *Richard*, AFTER *the ſaid 28th Day of November in the*
" *ſame Replication mentioned, (being the* LAST DAY OF MI-
" CHAELMAS TERM *in the ſaid 32d Year of the Reign of our*
" *ſaid Lord the King,) that is to ſay, on the* EIGHTH *Day*
" *of* DECEMBER *in that Year; and on the* SAME *Day and*
" *Year, was* SIGNED *according to the Form of the Statute in*
" *ſuch Caſe made and provided; And that the ſaid Thomas*
" *Smith did* NOT *promiſe or undertake, in Manner and Form as*
" *the ſaid William* and *Richard have above complained, at any*

* P. 953. " * *Time* WITHIN SIX YEARS NEXT BEFORE THE " SAID EIGHTH DAY OF DECEMBER, *on which Day, the* " *ſaid Writ of Latitat was ſo* REALLY *and* IN TRUTH *ſued* " *out as aforeſaid:*" *And* THIS *the ſaid Mary is ready to verify.* Wherefore She prays Judgment Whether the ſaid *William* and *Richard* ought to have or maintain their aforeſaid Action againſt Her.

Demurrer. To this Rejoinder the Plaintiffs demur, generally: And the Defendant joins in Demurrer.

This Demurrer was argued, on *Tueſday* 5th *February* 1760, by the two Counſel who had ſigned the Pleadings; *viz.* by Mr. Serj. *Poole* for the Plaintiffs, and Mr. *Yates* for the Defendant.

The only Queſtion was, " Whether the Truth of the " Fact could, in this Caſe, be averred *contrary* to the Fiction of Law."

Mr. Serj. *Poole*, for the Plaintiffs, argued that the Rejoinder was a *bad* One, for two Reaſons:

1ſt. It is *averring againſt the Record:*

2dly. It is contrary to, and deſtructive of the *Practice* of this Court; and tends to *deſtroy* the Writ of *Latitat* itſelf; For the Writ would be a *Nullity*, if teſted in Vacation.

1ſt Objection. Firſt—It is an Averment *againſt the Record.* For the *Teſte* of the Writ *is a Matter of Record.* 1 *Siderf.* 271. *Baily* v. *Bunning.* 1 *Mod.* 188. *Farrer* v. *Brooks, Adminiſtrator of Jo. Brooks. Cro. Car.* 264. *Watts* v. *Baker.* 1 *Ro. Abr.* 538. Title *Court*, Letter *M. pl.* 4. S. C. 1 *Sid.* 53. *Dacy* v. *Clinch. Style* 156. *Coles* v. *Sibſye. Carthew* 233. *Culliford* v. *Blandford. Sir T. Jones* 150. *Walburgh* v. *Saltonſtall.* 1 *Lutw.* 333. *Aldworth* v. *Hutchinſon.*

In *Paſ.* 5 *G.* 2. *C. B.* The Caſe of *Jones* v. *Burnet* was an *Aſſumpſit* againſt the Defendant, brought by the Plaintiff as Indorſee of a Promiſſory Note, by an Attachment of Privilege. The Defendant pleaded " that the Attachment " iſſued on the 12th of *February*, and that the Note was " not indorſed till after that Day." The Replication was " That *reverà* the Writ was ſued out in the Vacation &c, " on ſuch a Day, though teſted on the 12th of *February*; " and that the Note was indorſed before that Day." And on Demurrer, the Replication was held bad. This is a Caſe in Point: For it was " That *reverà* it *was ſued out in Va-* " *cation-time, viz.* on ſuch a Day &c."

The only Caſes where this has been attempted in *this* Court, are the two following; *viz. Hoare* v. *Yates, P.* 5 *G.* 2. *B. R.*

* 2. *B. R. uſq*; *Tr.* 7. 8. and *M.* 8 *G.* 2. But no Judgment was given in that Caſe; it having been, at laſt, ended between the Parties. It was upon a *Bill of Middleſex*, which has *no* Teſte: But *this* is on a *Latitat*, "which *has* "*a Teſte.*" The other Caſe was that of *Metcalfe* v. *Burroughs*, *M.* 14 *G.* 2. *B. R.* S. P. But this Caſe, though ſolemnly argued, was never determined: It was to have been argued a ſecond Time; but never came on any more. * P. 954.

In Proof of the Second Poſition, He cited the Caſe of * *Eaſtwick* v. *Cook*, *P.* 2. *G.* 2. *B. R.* 1 *Saund.* 298. *Greene* v. *Jones.* 1. *Siderf.* 304. *Mandamus, pur Sterling, al. Moniers.* 2 *Salk.* 700. *Shirley* v. *Wright.* 2d Objection. * *V. Vitz-Gibbon* 66.

Theſe Caſes are in Point, to prove "that a *Latitat* "*really* teſted in Vacation would be void." And if the Plaintiff ſhould have a Verdict and Judgment upon ſuch an Iſſue as this, it would be a Nullity and erroneous. And yet if the Rejoinder be proper, the Plaintiff muſt be obliged to ſurrejoin accordingly: Which would be nugatory.

Suppoſe upon a Fine, (where the Writ of Covenant always bears Teſte before the *Dedimus*,) It ſhould be averred "that *in Fact* the Writ of Covenant did not iſſue "till *after* the *Dedimus*," This would, if it were to be permitted, ſet aſide all the Land Securities in the Kingdom. So, in the Caſe of Recoveries, any ſuch Averment of the Proceſs iſſuing, *in Fact*, in Vacation-time, would be bad. *By Law*, no Proceſs *can* iſſue, but in *Term*-time, in *any* Caſe whatever. This Method of Pleading might be extended to *all* Caſes, if it were to be allowed in *any*.

And the Defendant is *Eſtopped* from averring this Fact: For the Objection ariſes from One who is *Party and Privy to the Suit*; Which differs from Caſes of Averments by *Strangers*, who are intitled to many Privileges which *Privies* can *not* claim. 3d Objection. (Eſtopped.)

Mr. *Yates*, *contra*, for the Defendant.

This is an Action on ſeveral Promiſes made by the Defendant's Teſtator; To which, She pleads *Non aſſumpſit infra ſex Annos* of the Time of *exhibiting the Bill.* The Plaintiffs reply "That the Plaintiff ſued out a *Latitat* teſted on "the 28th of *November*." The Defendant rejoins "That "*in Fact* the *Latitat* was iſſued out on the 8th of *December*; "And that the Defendant's Teſtator did not promiſe within "6 Years of *that* Day." To which Rejoinder, the Plaintiffs have demurred.

This

* P. 955. * This Point depends upon the Conſtruction of the *Statute of Limitations:* And the Queſtion is, *What is* a COMMENCEMENT or SUING of the Action, *within that Statute*; And, Whether the Defendant be *at Liberty* to aver the *real* and *true* Day, on which the *Latitat* in Fact iſſued.

Mr. Serj. objects "That this is Averring *againſt the Record*; That it would be *deſtructive* of the *Practice of the Court*, and even of *the very Writ itſelf*;" and "that the Defendant being *Party* and *Privy* to the Suit, is *eſtopped* from averring this Fact."

It may be obſerved, in the firſt Place, that *No* TESTE *of this Writ is expreſsly* SHEWN; nor is there even a *Reference* "*prout patet per Recordum:*" The Plaintiff *only alledges* "That he *ſued out a Latitat teſted* on the 28th of "*November.*

However, what We deny is the Fact "that the Writ "ISSUED *on the 28th of November.*" The very *Iſſuing* of the Writ *at all*, may be denied: Much more, the *Time* of iſſuing it, or the *Day* upon which it iſſued. We ſay "That "*in Fact* it did *not iſſue*, *till* the 8th of *December.*" This Fact We aver, and rely upon.

And the *true* Time of taking out the *Latitat may* be averred, *contrary* to the nominal Teſte: The Plaintiff may *declare* ſo; And the Jury may *find* ſo. This was determined in the Caſe of *Walburgh* v. *Saltonſtall*, 1 *Vent.* 362, 363.

The *Suing out* this Writ is a Matter of *Fact*; an Act done by the Plaintiff: And the Court will *not intend* "That "this *Latitat* was really *ſued out and iſſued* in Term," *merely* becauſe it is *teſted* in Term time; Eſpecially, when the Fact *appears upon the Record* to be otherwiſe. And the Fact *does* ſo appear upon the Record: For the *Demurrer admits* "That the Writ was, *in Fact*, ſued out and iſſued OUT "of Term."

And there is nothing to preclude the Defendant from ſhewing and averring this Fact: Here is *no Eſtoppel* at all; becauſe the Truth is *apparent upon the ſame Record. Co. Lit.* 352. *a. b.* lays down the Rules of Eſtoppels; and the 8th Rule is expreſsly ſo. The Caſe of *Kemp* v. *Goodal* in 1 *Salk.* 277. ſettles the Difference about Eſtoppels; and lays it down "That where the Eſtoppel *appears upon* "*the Record*, the other Side may demur." 1 *Lutw.* 329, 333, 334. *Aldworth* v. *Hutchinſon* was the ſame Point: And it is there obſerved "That if that Judgment was giv-"en upon the Reaſon of an Eſtoppel, a Covenant might "be in Judgment of Law broken, where, in Fact, it was "*not broken.*"

But

* But even ſuppoſing the Teſte to have been formally and expreſsly ſhewn, yet the *Time* when a *Latitat* ISSUED, is *traverſable*, and *may* be averred different from the Teſte. The Caſe of *Bilton* v. *Johnſon and Long*, in 2 *Keb.* 173, 198. and *Raymond* 161, is a Reſolution in Point, moſt expreſs and ſtrong. The Caſe of *Chancy* v. *Rutter*, 3 *Keb.* 213. was a ſubſequent Determination of the ſame Point, accordingly; and upon the Authority of the former Caſe, and of *Bennet* and *Pilkin*'s Caſe. The Caſe of *Lazall* v. *Dyer*, 2 *Salk.* 650. is ſtrong in Point: Where the Court held a Writ teſted of a preceding Term, though *legally* a Proceeding of that Term, yet not to be ſo in *Fact*. And 1 *Ro. Abr.* 552. Letter *F. Pl.* 4, 5. is to the ſame Effect, and diſtinguiſhes between the *Purchaſe* of the Writ, and the *Date* of it. * P. 956.

The Caſe of *Man* v. *Adams*, in 1 *Siderf.* 432. was an Action of Debt againſt an Executor; who pleaded *plene adminiſtravit*: And there was a Replication of "Aſſets *die* "*exhibitionis billæ, ſcilicet* the "23d of *October*." The Court ſaved to the Defendant, upon Evidence, the *Time of the coming in* of the Bill.

The *Stamp-Act* requires the Officer who ſigns the *Latitat* to ſet down the Day and Year of *Signing* the Writ. Now the Officer could never be *convicted* of a Neglect of his Duty, if no Averment could be made contrary to the Teſte. Therefore there *are* Caſes where this *may* be done.

The next Conſideration is, "Whether *this* be a Caſe, "where it *may* or *ought* to be done."

As to the Caſe of *Watts* v. *Baker*, in *Cro. Car.* 264. It concludes Nothing to the preſent Caſe. The Time of *ſuing out* the Writ could not be in Queſtion in that Caſe: For the very *Arreſt* itſelf was prior to the Tender of Amends.

The Caſes of *Dacy* v. *Clinch*, 1 *Sid.* 53. and *Coles* v. *Sibſye*, in *Style* 156. and *Culliford* v. *Blandford*, in *Carthew* 233. are only, "That ſuing out a *Latitat* within 6 Years "will ſave the Statute:" They prove Nothing more.

In the Caſe of *Metcalfe* v. *Burroughs*, the Return was ſet forth; and the Record referred to. As to the Caſe of *Aldworth* v. *Hutchinſon*, in 1 *Lutw.* 333. there was no final Judgment, nor any Cauſe ſhewn: And the Reporter's own Note upon the Judgment *niſi*, is *againſt* it.

The

* P. 957. * The Caſe of *Jones* v. *Burnet* differs from this Caſe: And there, the Plaintiff contradicted his *own* Writ. He might have brought his Action ſooner too. And that was an Attachment of Privilege: This is a *Latitat*.

* *V.* 2. *Jones* 149. 1 *Ventr.* 62. *Skinn.* 32. In the Caſe of * *Walburgh* v. *Saltonſtall*, *Holt* only argued as Counſel: He did not ſpeak as a Judge. Therefore what He there ſaid, was no Authority at all: Eſpecially, as the Court determined *againſt* him.

The Caſes of *Baily* v. *Bunning*, and *Farrer* v. *Brooks*, were Queſtions on *Common Law* Points: This is on the Conſtruction of an *Act of Parliament*. And the *fictitious* Relation of the Teſte ought not to claſh with the *Intention of the Legiſlature*, in the Conſtruction of an Act of Parliament. Much leſs ſhall the *fictitious* Relations of Law *overturn* the Intention of the Legiſlature in a Statute made for the *Security* of the Subject, and to *prevent* ſtale Demands from being ſet up.

The Caſe of *Green* v. *Rivett*, in *Salk.* 421, and 422 particularly mentions *this* Statute as being to be *favoured*; "becauſe the Security of all Men depends upon it."

The Words of the Statute are "*commenced and ſued* "WITHIN 6 *Years, and* NOT AFTER:" Therefore the Plaintiff *can not enlarge* the Time to 6 Years *and* 4 *Months*. The Word "*ſued*," is as ſtrong as if it had been "*actually* "*ſued*:" And it is confined to "*not after*" the Six Years. So that the Plaintiff was *actually barred* by the Statute, *before* he ſued this Writ. And *Fiction* ſhall not elude the Statute, when the Plaintiff was *already barred* by it. Theſe Fictions do *not always* prevail: And they ſhall never prevail ſo as to work a *Wrong*. The Caſes of *Bilton* v. *Johnſon and Long*; and *Chancy* v. *Rutter*; and 1 *Ro. Abr.* 552; and *Man* v. *Adams*, all prove this.

It has been urged, "That this Rejoinder would *deſtroy* "*the Latitat* itſelf, by *making* it a *Nullity* and erroneous." But this Writ was, *in Fact*, *originally a Nullity*, within the Meaning of this Statute; as being ſued in Vacation, *after the 6 Years were expired*. However, here the *Averment* is *eſſential* to the Merits of the Caſe, and the Proviſion of the Statute. *If* the Writ was *in Fact* ſued out, *after* the Six Years expired; it is *immaterial*, Whether it be a Nullity or not, in Point of *Legal Form*: For the *Time of ſuing out*, muſt here be taken in the true *ſubſtantial* Senſe of the Words.

He

* He alledged that the Juſtice of the preſent Caſe was on his Client's Side; And relied upon his Obſervation above-mentioned, that this Rejoinder purſues the very *Words* of the Statute, which is a *beneficial* Law, and ought to be *favoured*. * P. 958.

Mr. Serj. *Poole*, in Reply. It appears upon the *Face* of the *Record*, "That the Teſte and Suing out of this Writ "was in *Term*-time:" For it is *neceſſarily to be preſumed* that the Writ *muſt have actually iſſued* on the Day when it was teſted, which muſt be in Term-time. And it is here, in this Replication, alledged in the *Common* Way of ſetting it out in Pleading.

The *Eſtoppel* here appears *upon* the *Record* itſelf; And therefore it *need not be pleaded* by a *Party* to the Record.

As to the Caſe of *Bilton* v. *Johnſon* and others, in 2 *Keble* 173, and 198, and in *Raymond* 161. That may ſafely be admitted to be Law: For that is the Caſe of a *Stranger*; (for the Defendant, the * Sheriffs Bailiff, was a *Stranger* to the Original Action;) and it was for the *Furtherance of Juſtice*, and to prevent Frauds. But that Caſe does not prove "That it may be done by *Parties* and *Privies*." *Harriſon*'s Caſe cited in 3 *Keb.* 213, 214. in the Caſe of *Chancy* v. *Rutter*, expreſsly takes the Diſtinction between *Strangers* and *Parties* or *Privies*; and ſays "That a Stranger is not "concluded; but the Party is." The Caſe of *Pigot* v. *Rogers*, *Cro. Jac.* 561. was alſo the Caſe of a *Stranger*; not of a Party or Privy. * *V.* 2 *Keble* 173.

As to the *Stamp-Act*, and the *Statute of Frauds*—The *former* only relates to the *Officer*; It does not affect the preſent Doctrine. The *latter* relates only to *Purchaſers*: The Judgment is the ſame as it was *before*, with regard to *all other* Perſons.

As to Conſtruing the *Statute of Limitations* according to the *Intention*—The "*Commencing a Suit*," and "*Suing out* "*Proceſs*," (the two Expreſſions uſed in the Statute,) muſt mean the very *ſame Thing*: and this muſt be determined by the Teste of the Proceſs ſued out, as a *Commencement* of the Suit.

Lord Mansfield—This is the ſeventh or eighth Time that this Queſtion has been argued at the Bar: Therefore there needs no further Argument. We will conſider of it.

Cur. advis.'

Lord Mansfield now delivered the ſolemn Reſolution of the Court; (having firſt ſtated the Pleadings very particularly; in which, he ſaid a great Part of the Argument conſiſted.)

* P. 959. * This Demurrer can only be ſupported upon one of theſe two Grounds; either (1ſt.) That the *Fact averred is not relevant*; Or (2dly.) Suppoſing it relevant, That *Proof cannot be received*, to *ſhew* the Truth.

The firſt depends upon the Conſtruction of the Statute of Limitations * 21 *Jac.* 1. *c.* 16.

Now there never was a plainer Propoſition, conceived in plainer *Engliſh* Words, than the Rule laid down by this Act of Parliament: It enacts "That all Actions upon the Caſe "(other than ſuch Accounts as concern the Trade of Mer-"chandize between Merchant and Merchant, their Factors "and Servants) ſhall be COMMENCED AND SUED within "Six Years next after the Cauſe of ſuch Actions or Suit, "*and* NOT *after*."

The Statute is *Negative*, and prohibits that which muſt be the Act of the Party. Be the *Form* as it may, The SUING COMMENCING or BRINGING an Action, muſt be by ſome *Act* of the Party: And THAT is the *Thing prohibited*, after the Expiration of the limited Time.

† *V.* §. 1, 2, 3. The preceding Act of Limitation, 32 *H.* 8. *c.* 2. computes the Preſcription, from the Time run before the † TESTE of the Writs therein mentioned: But, becauſe *that* would not be a *true* Criterion of the Time of commencing Suits within the Proviſions of this Statute of 21 *Jac.* 1. *c.* 16; The Legiſlature has, in the latter, (which profeſſes to be made for quieting of Mens Eſtates and avoiding of Suits,) *purpoſely avoided* mentioning the Teſte of Writs, the Exhibiting Bills, the Arreſting, the Holding to Bail, Summoning, Serving or any other Form of Proceſs; but leaves to every Court, to ſay "*What Act of the Party* COMMENCES "*the Suit*;" and, after the limited Time, forbids *that* being done. The Moment the Six Years expire, the Prohibition *attaches:* The Legiſlature ſays "he ſhall *not ſue* AFTER "that Time." If the Time expired in *June*, and He *takes out* his firſt Proceſs in *October*; That *Act* done by him in *October* is prohibited, and againſt the Law: For the Statute ſays he ſhall NOT *ſue* AFTER. If by *Antedating* the Writ, He does ſue after; then this *Effect* of the *Antedate* is directly *contrary* to both the Words and Meaning of the Act of Parliament.

No Anſwer has ever been given to this, but by ſuppoſing that the Statute *meant* to prolong the Time, as to Suits in the *King's-Bench*, as far as the *Courſe* of that Court, of Antedating Writs, would carry it.

This

* This begs the Queſtion, againſt Demonſtration. The *Words* are *general:* The *Reaſon* of the Law is *general*, and *incompatible* with this Exception. * P. 960.

Why bar the bringing Suits by *Original*, and not by every *other* Writ? *Why* ſhut the Door of every *concurrent* Juriſdiction throughout the Kingdom, while the Court of *King's Bench* was left open? What *ſhould be* the Period, was at firſt arbitrary and indifferent: But when it is once fixed, It muſt *equally* bar, in *every* Court; Otherwiſe, it is no Limitation of Actions, nor Avoidance of Suits.

The Courſe " of Ante-dating Writs ſued out in the Vaca-" tion, and ſuppoſing them to be of the precedent Term," affords no Colour for implying ſuch an Exception. The Legiſlature *might* have ſaid " that after Six Years a Writ " ſhould not be ſued out in the Vacation, *though* bearing " Teſte before the End of the Six Years." *If Taking out* the Writ be that *firſt Step* by which the Party *brings* or *commences* his Suit, The Legiſlature *has* ſaid, " That after Six Years " He ſhall *not take out* the Writ." The Statute conſiders the Time when the Suit is *really* brought; and can by no Poſſibility be implied to refer to the retroſpective Teſte of the Writ, *by the Courſe of this Court.*

If ſo plain a Thing can be made plainer, there happens to be a Clauſe in the Act, which is deciſive *—" Sufficient " Amends may be tendered for an involuntary Treſpaſs, " *before the Action brought.*" Apply the Argument to this Clauſe, and the Proviſion will be thus;—" To prevent " frivolous and vexatious Suits, there may be a Tender of " ſufficient Amends, BEFORE *the Action brought:* but by " an *implied Reference to the Courſe of the Court of King's* " *Bench*, the Party may, AFTER *the Tender*, bring his " Action with an *Ante-date*, which ſhall *over-reach and de-* " *feat* the Tender." And ſo the *implied Reference* repeals the *expreſs Text.* * The 5th Clauſe.

It happens moſt unfortunately too, for this Hypotheſis " of an *implied Reference* to the *artificial* Commencement of " an Action by the *Courſe of this Court*," that *if* it was *admitted*, the Suing out a LATITAT would *not* ſave the Running of the Statute. The BILL here is *as* an Original Writ; and the Want of it *equally cured*, after a Verdict: It is the firſt Proceſs upon Record; and, by the Courſe of this Court, the Commencement of the Action. The Form of pleading the Statute of Limitations ſhews *that:* It is " *Ante Impe-* " *trationem Brevis*," in the one Caſe; " *Ante Exhibitionem* " *Billæ*," in the other.

It

* P. 961.

* *Style* 156. *M.* 1649. *Banc. Sup.*

† 1 *Siderfin* 53.

* It was not ſettled till many Years after the Statute, "that the Plaintiff *might* reply to a LATITAT ſued out within "the Six Years." In the Caſe of * *Coles* v. *Sibſye*, in 1649, it came before the Court; And the Point was adjourned. But in *Mich.* 13 *C.* 2. in the Caſe of *Dacy* v. *Clinch* †; and lately, in *M.* 21 *G.* 2. *Henderſon* v. *Whitaker et al'*: It was determined "that the Plaintiff *may* reply a *Latitat*." There could be no Doubt but that *Exhibiting the Bill* was bringing the Action; and therefore the Plea "that Six "Years had run before *Exhibiting the* BILL," was *certainly* good: But the LATITAT was held (and rightly held) to ſave the Bar, within the *Reaſon* and *Equity* of the Caſe. The Statute did not intend to bar, unleſs the Party had *acquieſced* Six Years. But he who ſued out a *Latitat*, to bring the Defendant into Cuſtody that he might declare againſt him, *did not acquieſce*, within the *true Meaning* of the Act; though, *artificially*, the BILL is, upon the Record, the *firſt* Step. The Day He ſued out the *Latitat*, He *might* have taken out an ORIGINAL: And any Conſtruction of the Statute; to make it bar *One* Form of Suing, while *Others* were open, was nugatory and contrary to its true Intent. But to bring it within the *Equity* of the Law, the *Latitat* muſt be taken out *with Intent to declare in that Action*, and muſt be *continued* to Filing of the Bill.

When the Replication of a *Latitat* came to be allowed to ſave the Bar and prevent the Running of the Statute, *becauſe* Suing out a *Latitat* was, *in real Truth*, an Act of Diligence in the Party, and the *firſt* Step towards recovering his Demand by the Action depending, (though in a *ſtrict legal* Senſe, by the Courſe of this Court ſuch Action is not deemed to be brought till the Bill is filed;) It would be moſt extraordinary and moſt unequitable, *not to allow this Equity to be rebutted* by the Defendant, by ſhewing, "that *in real* "*Truth* the Time *was run* before the Plaintiff took *any* "Step." He was *actually barred*, before he ſued out the *Latitat*; though, in *Form*, by the Courſe of this Court, As the *Action* is ſuppoſed to be brought *later*, the *Latitat* is ſuppoſed to be taken out *earlier*, than the *real Truth*.

Very unequal would that Interpretation be, which ſhould conſtrue the ſame Words, *for* the Plaintiff, *according* to the real ſubſtantial *Truth* of the Thing, in *Oppoſition* to legal Forms; and *againſt* the Defendant, *according* to legal Notions and Forms, *contrary to real Truth*: More eſpecially when the Law, from the Nature of it, ought to be taken liberally in *Favour of Defendants*.

The Limitation of Suits is founded in public Convenience; and attended with ſo much Utility, that Courts of Equity adopt this Statute as a poſitive Rule, and apply it, by Parity of Reaſon, to Caſes not within it.

This

* This very Cauſe, between Parties who (on both Sides) are *Strangers* to the whole Tranſaction, ſhews the Wiſdom of *ſome Limitation.* * P. 962.

Therefore We are All clearly of Opinion, That, within the true Meaning of the Act of Parliament, *Six Years having expired* BEFORE *the Latitat was* IN FACT TAKEN OUT, is ſufficient to rebutt the Matter of the Plaintiff's Replication; which alledges, that although the Suit was not brought within the Six Years, *according to the Courſe and legal Notions of this Court*, Yet, *in Fact*, It was brought within the Time, *by ſuing out the Latitat*. Which brings Me to the

Second Point—Whether the Party may be *permitted* to SHEW that the *Latitat* was taken out after the Six Years expired.

If the TESTE of a *Latitat* was *concluſive*, Wrong muſt neceſſarily be done, in many other Caſes as well as the preſent; And great Inconvenience and Abſurdity would follow. No Man, whoſe Cauſe of Action aroſe in the Vacation, could ſue out this Proceſs till the next Term: Which would be an Injury to *Plaintiffs*, and defeat the very End for which this Practice was introduced. The Defendant might be arreſted long before the Writ: He might be ſued after he had made a legal Tender; which would be a manifeſt Injury to *Defendants.*

But the Court would not endure that a *mere Form* or *Fiction of Law*, introduced for the Sake of Juſtice, ſhould work a *Wrong*, contrary to the real Truth and Subſtance of the Thing: and they have (for 150 Years) uniformly held, "That where it became *material* to diſtinguiſh, They would "conſider the Day when the Writ was *taken out*, as the "*Subſtance*; and the *Teſte*, as the *Form.*"

In the Caſe of * *Pigot* v. *Rogers*, it was held That a *Latitat* bearing *Date before* the Bond upon which the Action was brought, but *returnable after*, was right; becauſe, ſays the Court, "the Proceſs always bears Teſte the laſt Day of the "Term before." So in 3 *Keb.* 213. An Obligation "not "to proſecute before a limited Time," was holden not to be broken by a *Latitat taken out* AFTER the Time, though it was *teſted* BEFORE: The Reaſon given is, "becauſe the "*Latitat* is not ſuable with any other Teſte than of the "preceding Term." * *H.* 17 *J.* 1. *Cro. Jac.* 561.

Where the *Arreſt* is before the *Actual* Suing out of the Writ, It has been often determined "that it cannot be juſ-"tified; and that the *Day when it iſſued* may be averred, "notwithſtanding the *Teſte* is before the Arreſt."

The

* P. 963.

‡ *P.* 19 *C.* 2. *Raym.* 161. and 2 *Keble* 198.

* The Caſe of ‡ *Bilton* v. *Johnſon and others*, was Treſpaſs and falſe Impriſonment in *London*. The Defendant pleads that *J. S.* ſued forth a Writ of *Latitat*, the laſt Day of *Trinity* Term, directed to the Sheriff of *R*; and by Virtue of that, the Sheriff of the ſaid County made a Warrant to the Defendant, whereupon he took the Plaintiff; (Which is the ſame Impriſonment;) *abſque hoc* that He is Guilty in *London*, *vel aliter*, *vel alio modo*. The Plaintiff replies "That the ſaid Writ was *in Truth* proſecuted "*after* the Impriſonment, to wit on the 9th of *Auguſt*." Upon this, the Defendant demurs. And it was Adjudged for the Plaintiff; "Becauſe although the Teſte of the Writ "is upon Record, and the Plaintiff can not aver againſt it, "Yet here will be great Inconveniencies if the Plaintiff "cannot ſet forth the *very Time* when it was *purchaſed*: "And the Relation of the Date to the laſt Day of the pre-"ceding Term is only calculated to prevent *Fraud*, but "NOT to *juſtify* a *Tort*." And in the ſame Caſe, Ld. Ch. J.

† 2 *Keble* 198.

"*Kelynge* is † reported to have ſaid, "That the *Time when a* "*Latitat iſſued forth is traverſable*, and *may be averred* "*otherwiſe than according to the Teſte*:" Which was agreed "by the Whole Court; "For a *Relation ſhall not work a* "WRONG." "If a Man be taken in the Vacation by "Warrant *without Writ*, and a *Latitat* be procured *teſted* "*in the preceding Term*, it ſhall not diſcharge the Wrong "done *after the Teſte*, and *before the actual Taking out* of "the Writ; but the Plaintiff may take Iſſue, *when* it was "proſecuted *in Truth*."

‖ *P.* 21 *C.* 2. 1 *Vent.* 28.

In the Caſe of ‖ *Hanway* v. *Merrey*, It was holden, "that "though a *Latitat* may be *taken out before* the Cauſe of "Action, yet the Party cannot be *arreſted* upon it till *after*:" And in that Caſe, the Court diſcharged the Arreſt.

* *M.* 25 *C.* 2. 3 *Keble* 213.

In the Caſe of * *Chauncy* v. *Rutter*, In Treſpaſs and falſe Impriſonment, the Defendant juſtified by Arreſt on a *Latitat*; The Plaintiff replied, "that the Writ was *taken* "*out after the Arreſt*;" To which Replication, the Defendant demurred: *Et per Curiam*, "The *Ante-date* of the "Writ will *not* ſuffice, if the *Proceeding* be *after*."

† *Tr.* 8 *Car.* 1 *Cro. Car.* 264.

So, as to *Tenders*—In the Caſe of † *Watts* v. *Baker*, It was holden "That a Tender came too late *after an Arreſt* upon "a *Latitat*." But the *Ground* of that Caſe *implies*, that if a Tender was made before the *Latitat* taken out in Fact; the *retroſpective Teſte* of the Writ, (which might be even before the Cauſe of Action,) could not deprive the Defendant of the Benefit of that Tender.

In an Action upon the Caſe, where it is neceſſary to ſtate the Taking out a *Latitat*, the Party may *declare* "that it "was *ſued out* ſuch a Day in the *Vacation*, bearing Teſte the "laſt

" * laſt Day of the preceding Term:" Or, if the *Teſte* *only* be ſtated in the Declaration, and the Queſtion ſhould turn upon the *preciſe Day* when it was *taken out*, the Jury may *find* it. And this was * Adjudged, ſo long ago as the Reign of *Charles* the Second. The Declaration alledged the *Latitat* to be ſued out of the Court on the 21ſt of *January*: The Jury found that the Teſte of it was on the 28th of *November*, being the laſt Day of the preceding Term; but that it was *indeed ſued out* of the Court on the 21ſt of *January*, as the Plaintiff had declared. The Declaration was held to be good, *becauſe it was according to the Truth of the Fact*, though the *Teſte* of a *Latitat* muſt be of the *preceding Term*.

* P. 964.

* *H.* 3, 34. *C.* 2 *Walburgh v. Saltonſtal*; Sir *T. Jones* 149. and 1. *Ventris* 362.

In the † ſame Caſe, reported in † 1 *Ventr.* 362. It is ſtated that a Special Verdict was found, " that the *Latitat* " bore Teſte the 28th of *November* 32 *Car.* 2. but was " *really taken out* on the 21ſt of *January* following." *Holt*, who was Counſel for the Defendant, argued that *by Law* it muſt be deemed to be taken out the 28th of *November*, when the *Teſte* is. Ld. Ch. J. *Pemberton* is reported to have given the Rule in the following Words—" We know, the *Courſe* " *of this Court* is, to Teſte *Latitats* taken out in the Vacati- " on, as of the Term preceding: and the *Courſe* of a Court " is the *Law* of a Court. The Plaintiff might have *declar-* " *ed*, That he ſued out a *Latitat* the 21ſt of *January*, teſted " the 28th of *November* preceding: And if he be not eſtop- " ped to *declare* ſo, Surely the Jury may *find* the whole " Matter." And ſo Judgment was given for the Plaintiff.

† This is *another Argument* of it, three Terms later than that in Sir *T. Jones*.

Numberleſs are the Acts of Parliament in the Statute-Book, which give Actions " *ſo as* the Suit be *brought* or *commenc-* " *ed* within One, Two, Three, or Four Months, or ſome " longer Time, *and not afterwards*:" And many give Actions to the Party aggrieved, to be brought within 2, 3, or 4 Months; And *if* the Party aggrieved do not ſue *within* that Time, then to a common Informer.

Notwithſtanding the Doubt in the Caſe of ‖ *Culliford* v. *Blandford*, It is now ſettled " that a *Latitat* is a good Com- " mencement of a penal Action;" and was ſo holden in this Court, in *H.* 22 *G.* 2. in the Caſe of ‡ *Bridges qui tam*, v. *Knapton*.

‖ 4 *Mod.* 129. *Tr.* 4. *W. & M.* 1692. in *B. R.*

‡ I find the *ſame Point* ſolemnly determined in *another* Caſe, in the very Term next preceding, viz. *Hardman, qui tam &c.* v. *Whitaker & al'. M.* 1748. 22 *G.* 2. *B. R.*

If the *Teſte* of a *Latitat* was to be *concluſive* as to the Time of Suing, the Time given by the Legiſlature might be *enlarged* to double or triple the Number of Months. After Expiration of the Time given to the Party aggrieved, the common Informer might take out a Writ: And then the Party aggrieved might *defeat* his Right, *after* it had attached, by taking out a *Latitat* with an Ante-date. By this meer Form, or Fiction of Law, (which for good Purpoſes gives the

* P. 965. * the *Latitat* an Ante-date, merely as a Matter of Form,) Penal Statutes would be rendered *more* Penal; and Men would be ſubject to Penalties to which, by Law, according to the Truth of the Caſe, they are *not liable*

The Plaintiff who ſues upon any of theſe Acts (which are very numerous) muſt take out the Writ, in *Fact*, within the Time; The *Teſte* of the Writ will not be ſufficient. The *Act* done by him, in commencing the Suit within the limited Time, is in the Nature of a *Condition precedent*, to intitle him to maintain that Action.

If the Legiſlature had not taken for granted, "That the "true Time of ſuing out a Writ might be ſhewn, in Op- "poſition to the Teſte," It would have been abſurd to have limited the Time to One, Two, or Three Months, follow- ed by the Negative Words "*and not afterwards*;" Or, in Default of the Party aggrieved Suing within ſuch Time, to give an *immediate* Right to a common Informer: And yet this is the Form in which ſuch Acts are Penned, from the Beginning to the End of the Statute-Book.

* C. 15. The Act of 23 *H.* 6. * gives a Penalty of 40*l.* to the Burgeſs choſen and not returned, *ſo as* He ſue for the ſame *within* 3 Months; or to any other Perſon, who, in Default of him ſo choſen, ſhall ſue for the ſame.

Suppoſe *Latitats* were taken out, upon this Act, by the Party aggrieved, and *alſo* by many *other* Perſons, in the *Long Vacation*, all bearing the Date the laſt Day of *Trinity Term*; How could it be determined "*Who* had a Right to ſue," but by ſhewing the *true* Times when the Writs were reſpec- tively proſecuted?

The 9 *Ann.* *c.* 14. gives an Action to the Perſon loſing 10*l.* at Play, to be brought within 3 Months; and if he do not ſue *within* that Time, then to any Body elſe. There are a Multitude of Modern Acts, down to the preſent Seſſi- on of Parliament, penned exactly in the ſame Way.

I have been told, That at *Niſi prius* it has often been ruled, in Suits upon ſuch Statutes, "That the *true* Time of "taking out the Writ may be ſhewn, notwithſtanding the "*Teſte*."

The very Penning of 8 *G.* 1. *c.* 19. is abſolutely inconſiſt- ent with the Notion of the *Teſte being concluſive*; becauſe it ſays, "the Suit ſhall be brought *before* the End of the "next Term:" Which this Doctrine would conſtrue to mean "*after* the End of the next Term."

But

* But there is One Act in the Statute-Book, which *alone* would be deciſive, "that the true Time of Suing out the "Writ *may* be ſhewn." And that is the 5 *W. & M. c.* 21. §. 4. * where, (for preventing Abuſes by arreſting Perſons without legal Proceſs,) the Officer is required to enter the *very* DAY *when* the Writ is ſigned. But if the very Day could never be ſhewn in Pleading, or Evidence, it would have been moſt abſurd to have provided a Record from which it might appear. The Statute does *not* ENACT that the Teſte *ſhall* not be concluſive; but takes it *for granted*, that it *is* not. * P. 966.

* 'Tis *Sect.* 46. in the original printed Statute. And it is repeated in the 9, 10 *W.* 3. *c.* 25. §. 42.

It was due to the great and long Litigation which this Queſtion has borne in *Weſtminſter-Hall*, to conſider carefully every Thing that has been ſaid, and to look into every Caſe or Authority that has been quoted on the other Side.—I have done ſo: And, upon the moſt minute Examination, am not able to find any Principle of Law, Determination, or Authority, which contradicts the Propoſition I have endeavoured to prove, *viz.* "That where the *true* "Time of Suing out a *Latitat* is *material*, It may be "*ſhewn*, notwithſtanding the *Teſte*."

The Arguments againſt allowing ſuch an Averment, are drawn from Rules and Caſes, the *Reaſon* of which is not the ſame, though they bear a ſeeming Similitude in *Sound.*

No Concluſion can be drawn from Rules, eſtabliſhed in the Caſe of a Writ which OUGHT *to bear Date the Day it is ſued out*, and which may be quaſhed upon Motion, for Irregularity, if it be antedated.

I allow the Maxim laid down in † *Plowden*, and many other Books, "That no Man ſhall be allowed to plead or "prove that *ſuch* a Writ was ſued out on a different Day "from that on which it bears Date." *Plowden* gives the *Reaſon*; "Becauſe contradicting the Teſte tends to diſcre-"dit ſome judicial or other Officer of Record."

† *Plowd.* 491. *b.* 492. *a.*

But this only goes to the *Mode* of Redreſs: The falſe Date does not *finally* conclude the Party. His Redreſs is in a *Summary Way*, by Application to the Court out of which the Writ iſſues. And therefore in the Court of Exchequer, in the Caſe of the || *King* v. *Mann*, upon an Extent, The Court inclined to diſallow the Plea; and ſet aſide the Writ *upon Motion*, becauſe it was ante-dated.

|| 2 *Strange* 749.

But an Averment "that a LATITAT teſted the laſt Day "of the precedent Term, iſſued in the Vacation," does NOT tend to "diſcredit the Officer:" For, by Law, it

* P. 967. * *may* ſo iſſue, and *ought* to be ſo ante-dated. It can not be ſet aſide upon Motion for Irregularity; becauſe it is right. The Averment does NOT *contradict* the Record; becauſe, taking the *Courſe of this Court* together with the Teſte of the Writ, it ſtands *indifferent* whether the Writ was ſued out the laſt Day of the Term, or in the Vacation. And *there* is the Difference between ſuch a Writ as *this*, and thoſe that are intended by *Plowden*.

The Reaſon why No body ſhall be permitted to aver "that a *Judgment* was ſigned *after* the firſt Day of the "Term," or "that a *Fieri facias* was taken out in the "*Vacation*," is, becauſe the FACT is *not relevant:* The legal Conſequences do *not* depend upon the Truth of the *Fact*, on what Day the Judgment was completed, or the Writ of *Fieri facias* actually taken out; but upon the *Rule of Law*, "that they ſhall be deemed complete, and bind to "all Intents and Purpoſes, *by Relation*."

The Moment the *Law* ſaid, "Judgments ſhould bind "Purchaſers *only from the Signing*," it followed, that, in the Caſe of Purchaſers, the *Time* of Signing might be *ſhewn*.

If, to invalidate the Writ, there was an Averment "that it ISSUED *on a Day in the* VACATION;" There the Inference would hold from the Caſe of a Judgment, or *Fieri facias:* And, to be ſure, *ſuch* an Averment could not be allowed; becauſe, to *that* Purpoſe, the *Fact* is *not relevant*; For, by Law, a *Latitat may* iſſue in the Vacation, teſted the laſt Day of the precedent Term.

Authorities, "that a *Latitat* is *void*, if it *bears Teſte out* * *H.* 12 *G.* 1. in *B. R.* "*of Term*," (which is the Caſe of * *Buckridge* v. *Wright*,) prove nothing to the preſent Purpoſe; becauſe it is equally certain that it may be *purchaſed* out of Term, provided the *Teſte* be formal.

† *P.* 2 *G.* 2. in *C. B.* The Caſe of † *Jones, an Attorney*, v. *Burnet*, upon a *Writ of Privilege*, is not applicable. The Court there held the Replication to be inſufficient, but abated the Writ: And the Ground they went upon, was, That it appeared on the Plaintiff's own Shewing, "that his Writ *bore Date* "BEFORE his Cauſe of Action, though in Fact taken out "after." But they conſidered that Writ as *in the Nature of an* ORIGINAL, and *therefore* abateable, if it bear Date before the Cauſe of Action.

Now the direct contrary is the eſtabliſhed Law in the Caſe of a LATITAT; for it *may* bear Date *before*, if really proſecuted *after* the Cauſe of Action.

The

* The Caſe of ‡ *Aldworth* v. *Hutchinſon* has been much relied upon, though it was never argued again: Judgment *Niſi* is ſaid to have been given for the Plaintiff; and no Cauſe ſhewn. But no Judgment is entered upon the Roll. And there might be a very good Reaſon to give Judgment for the Plaintiff, upon the true Conſtruction of the Covenant. The † *Words* might very fairly take in *all* Proceſs *as of that Term*; eſpecially a *Judicial* Writ, which muſt proceed upon a Ground *prior* to the End of the Term. The Reporter, Suppoſing the Time of Suing out the *Scire facias* to be material, paſſes a ſtrong Cenſure upon the Judgment, *if* it ſtop the Party from ſhewing the Truth. For He ſays, "*If* ſuch "be the Ground, then, in Judgment of Law a Covenant "may be broken, when in Reality and Truth it never was "broken: *Quod nota.*" And it would be well worth Noting indeed: for no Propoſition could be more unjuſt.

* P. 968.
‡ 1 *Lutw.* 329, 333.

† *V.* 1 *Lutw.* 331 "Ita quòd tal' Secta, Actio, Proceſſus, Querela, Perturbatio, Clameum, vel Demand', contingerent incipi &c. per vel ante finem termini Sci' Mich' tunc prox' ſequen."

Upon the Argument in this Cauſe, It was ſaid "that Ld. "*Hardwicke*, in the Caſe of *Hoare* v. *Yates*, was of Opi"nion againſt the Averment; and that Mr. J. *Lee came over* "to that Opinion; and that His Lordſhip was *ready* to have "given Judgment, when He was told the Parties had "agreed.

I cannot form an Opinion upon a Point of Law, which would not be ſhaken by ſo great an Authority. But His Lordſhip has been ſo good as to let me have his Notes of the two Arguments, in that Caſe, before Him. There is no Notice taken in his Lordſhip's own Notes, of what might fall from Himſelf: And it does not appear from his Lordſhip's Notes of what Mr. Juſt. *Lee* ſaid, that He changed his Opinion. His Lordſhip ſays, He believes He had not formed a concluſive Judgment in his own Mind; and that He certainly had made no Preparation towards delivering it in Court. And He has been pleaſed to tell me, that He inclined to the Opinions of Mr. Juſtice *Page* and Mr. Juſtice *Lee*, (who were for *admitting* the Averment in the Defendant's Rejoinder,) againſt the Opinion of Mr. J. *Probyn*, who thought it could not be admitted, by Law.

And We are All moſt clearly of Opinion, "That the "*Averment* in the Defendant's Rejoinder ought, by Law, "to be *admitted*." Conſequently the Demurrer muſt be over-ruled; and

JUDGMENT for the DEFENDANT.

* P. 569. *Thurſday 8th May, 1760.*

* Martin, ex dimiſſ. Henry Weſton, *verſ.* Mowlin.

THIS was a Special Caſe from *Dorſetſhire* Aſſizes, Upon an Ejectment brought for the Recovery of a Cloſe of Paſture, of 12 Acres, called *New Cloſe*, Parcel of the Manor of *Wyke Regis* and *Ellwell* in the County of *Dorſet*. On "Not guilty" pleaded, and Iſſue thereon, the Cauſe came on to be tried: And a Verdict was found for the Plaintiff, Subject to the Opinion of the Court, on the following Caſe.

It appeared That the Premiſſes are Copyhold of Inheritance, holden of the ſaid Manor; And that on 29th *April* 1691, One *Andrew Buckler* and *Rachel* his Wife did duly make a Surrender of the Premiſſes, to *Henry Weſton*, in the Words following.

Then the Caſe ſets forth this Surrender, *in hæc Verba:* Which is to the Uſe of the ſaid *Henry Weſton* in Fee; Who was, at the ſame Court admitted accordingly; *Under a* PROVISO *and* AGREEMENT "That if the aforeſaid *Andrew Buckler* and *Rachel* his Wife or Either of them, or "the Heirs Executors and Aſſigns of Either of them ſhould "*pay or cauſe to be paid* to the ſaid *Henry Weſton* his Heirs "Executors or Aſſigns, the Sum of 5*l.* 10*s.* upon the 29th "Day of *October* then next, and the full Sum of 225*l.* 10*s.* "at or upon the 29th of *April* 1692, Then the ſaid *Henry* "*Weſton* his Heirs or Aſſigns, ſhould, upon the Requeſt "and at the Coſts of the ſaid *Andrew* and *Rachel* or One of "them, SURRENDER into the Hands of the Lord and "Farmers of the ſaid Manor, the Premiſſes aforeſaid with "the Appurtenances, To the Uſe and Behoof of the ſaid "*Andrew*, for the Term of his Life; And after his Deceaſe, to the Uſe and Behoof of the ſaid *Rachel* for "Term of her Life; And after the Deceaſe of them and "Both of them, to the Uſe and Behoof of the *Heirs of the* "*Bodies* of Them, begotten or to be begotten; And for "Default of ſuch Iſſue, then to the Uſe and Behoof of the "Right Heirs of the ſaid *Andrew* for ever, according to "the Cuſtom of the ſaid Manor. But if the ſaid *Andrew* "and *Rachel* their Heirs or Aſſigns ſhould make Default in "Payment of the Several Sums aforeſaid, or any of them, "according to the Tenor and true Intention of this Condition, that then this preſent Surrender ſhall remain to the "ſaid *Henry Weſton* his Heirs and Aſſigns for ever, in Force "and Effect as aforeſaid."

That by Virtue thereof, the ſaid *Henry Weſton* did enter into Poſſeſſion thereof, and was in Poſſeſſion at the Time of his Death, which happened on the 6th of *April* 1705.

That

* That the ſaid Sum was *not paid* according to the Condition of the ſaid Surrender: And it appeared that the *Equity of Redemption* of the Premiſſes was *not foreclo ſed or Releaſed* during the Life of the ſaid *Henry Weſton.* * P. 970.

It further appeared, that the ſaid *Henry Weſton*, on the 22d of *July* 1699, ſurrendered the Premiſſes and divers other Copyhold Eſtates in the ſame Manner, in the Words following, " Ad hanc Curiam venit *Johannes Gray* Unus Cuſtomar' " Tenem' iſtius Manerij, et hic in plenâ Curia, virtute cu- " juſdam Scripti vocat' a Letter of Attorney ei direct', et " Authoritate per idem Scriptum conceſſ' ſub Manu et Sigillo " Henrici Weſton al' Cuſtomar' Tenen' Manerij prædict' " geren' Dat' die et anno ſupradict', et in nomine et ex parte " ipſius Henrici Weſton, ſurſum reddidit in manus Domino- " rum et Firmar' Manerij prædict', Un' le Gentleman's Land " vocat' Lane Houſe &c &c &c (deſcribing ſeveral Parcels " lying within the ſaid Manor,) *Acetiam Un' Clauſ' Paſturæ* " *de novo incluſum* continen' per eſtimationem *duodecim Acras* " &c &c (deſcribing the Premiſſes in queſtion,) Necnon totum " Statum Jus Titulum Intereſſe Clam' et Demand' quæcunque " prædict' Henrici Weſton *tam in Lege* QUAM *in* ÆQUI- " TATE de et in Præmiſſis prædict' et qualibet inde Parte " et Parcella; Ad Opus et Uſum prædicti Henrici Weſton " pro termino Vitæ ſuæ; Et poſt Ejus deceſſum, Ad Opus " et Uſum talis Perſonæ ſive Perſonarum cui vel quibus, et " pro tali Statu ſive Statibus qual' ipſe prædictus Henricus " Weſton, *per Ultimam Voluntatem ſuam* aut per aliquod " aliud Scriptum ſub Manu et Sigillo prædicti Henrici " Weſton, dabit deviſabit limitabit declarabit ſive appunctu- " abit; Et pro defectu talis Donationis Deviſamenti Limita- " tionis Declarationis ſive Appunctutationis, Ad Opus et " Uſum rectorum Hæredum ipſius Henrici Weſton in perpe- " tuum, Secundum Conſuetudinem Manerij prædict. Super " quo, ad iſtam eandem Curiam venit prædictus Henricus " Weſton, et cepit de Dominis et Firmar' prædictis præmiſſa " prædicta ſuperius ſurſum reddita cum omnibus et ſingulis " eorum pertin,' Habend' et Tenend' omnia et ſingula Præ- " miſſa prædicta cum ſuis pertin', præfato Henrico Weſton " pro termino Vitæ ſuæ; et poſt Ejus Deceſſum, tali Per- " ſonæ ſive Perſonis cui vel quibus, et pro tali ſtatu ſive " ſtatibus qual' ipſe prædictus Henricus Weſton, *per ultimam* " *Voluntatem ſuam* aut per aliquod aliud Scriptum ſub manu " et ſigillo ſuis, dabit deviſabit limitabit declarabit ſive ap- " punctuabit, prout ſuperius limitatur; Et pro defectu inde, " rectis Hæredibus ipſius Henrici Weſton in perpetuum, ſe- " cundum Conſuetudinem Manerij prædicti; SUBJECT' " *tamen ſeparalibus* CONDITIONIBUS *in quibuſdam Copijs* " *Rotulorum Cur' Manerij præd' mentionat'*, quarum ſeparal' " Dat' ſunt prout ſequen', viz. Un' geren' Dat. 24to. die

" Januarij

* P. 971. " * Januarij 1682; Alter' geren' Dat' 17 die Octobris " 1689; et un' al' geren' Dat' 29 *die Aprilis* 1691; per " antiq' Redd' inde per annum, ac per omnia al' Onera " Opera Conſ' Sectas et Servitia inde priùs debita et de jure " conſueta. Et pro tali ſtatu et Ingreſſu &c, prædictus " Henricus Weſton dat' &c: Et ſic admiſſus eſt inde Te- " nens, fecitque &c."

That the Premiſſes in the laſt mentioned Surrender called by the Name of " One Cloſe of Paſture newly incloſed, " containing by Eſtimation 12 Acres," are the Premiſſes in Queſtion; and the ſame as were contained in the ſaid firſt mentioned Surrender.

On the 30th of *September* 1701, (the ſaid *Andrew Buckler* being then dead, and the ſaid *Rachel* his Widow living,) the ſaid *Henry Weſton* made and publiſhed his *laſt Will*, in Writing; and thereby deviſed in the Words following—" As to " my Worldly Eſtate, I diſpoſe thereof as followeth. And " firſt I give to my Son *William Weſton* the Sum of 200*l.* " of lawful *Engliſh* Money, to be paid to Him, within One " Year next after my Deceaſe: And as to the *Security* for " the Payment thereof, I do hereby CHARGE *All thoſe* my " Lands Tenements and Hereditaments *within and Parcel* " *of the Manor of Wyke Regis aforeſaid* which were hereto- " fore *ſurrendered to Me by John Gray* deceaſed; And alſo " All that my Cloſe of Meadow called *Orchard Meadow*, " lying and being in the Town of *Weymouth* in the ſaid " County. *Item*, I do hereby ſtrictly charge and command " my Son *Henry Weſton* to take great Care of my Wife, his " Mother; and to find and provide for Her, during her " Life, ſufficient and convenient Neceſſaries of All Sorts. " *Item*, I give and deviſe unto my Daughter *Mary Wallis* " Widow, One Yearly Annuity or Yearly Rent-Charge of " 15*l.* to be paid to Her Yearly and every Year from my " Death, for and during the Term of her Natural Life, " clear of all Deductions, and to be iſſuing due and pay- " able to Her out of thoſe my Lands called *Marſh* and " *Bowneham*, within and Parcel of the ſaid Manor of *Wyke* " *Regis*: Which ſaid Yearly Annuity or Rent Charge I do " hereby direct to be paid to my ſaid Daughter Yearly and " every Year by 4 equal quarterly Payments to be made on " *&c*; the firſt Payment to be made *&c*. And if Default " ſhall be made at any Time or Times in Payment of the " ſaid Annuity or Yearly Rent-Charge of 15*l.* on any or " either of the Feaſts aforeſaid, then I do hereby deviſe " unto my ſaid Daughter the ſaid Lands called *Bowneham* " and *Marſh* for and during the Term of her natural Life. " *And whereas Rachel Buckler Widow ſtands indebted to* " *Me, in a Conſiderable Sum of Money, I do hereby appoint* " *and give Her twelve Months Time after my Death, to pay* " *the ſame: And I do give Her* 50*l. to be allowed out of the* " *ſaid Debt*. *Item*, I give to the Poor of the Pariſh of *Wyke*

" *Regis*

" * *Regis* aforeſaid, the Sum of 4*l.* to be diſtributed amongſt * P. 972.
" them, by my Executor herein after named, at my Fune-
" ral. *Item*, ALL *my Lands Tenements and Hereditaments*
" WITHIN AND PARCEL OF THE SAID MANOR OF
" WYKE REGIS, And alſo all other my Lands Tene-
" ments and Hereditaments in the County of *Dorſet*, (*Such*
" *Parts thereof as are above charged* for the Payment of the
" ſaid 200*l.* to my ſaid Son *William*, and for my ſaid
" Daughter's Annuity, *ſubject thereto*), I do give and de-
" viſe unto my ſaid Son *Henry Weſton*, and unto *Ann* his
" now Wife, and to the *Heirs of the Body* of my ſaid Son
" *Henry on the Body of the ſaid Ann* lawfully begotten and
" to be begotten; and for Default of ſuch Iſſue, to my Right
" Heirs for ever. *Item*, I give and bequeath to my ſaid Son
" *Henry Weſton* All my Goods and Chattels and Perſonal
" Eſtate whatſoever; He paying my Debts Legacies and
" Funeral Expences: And I do hereby make and appoint
" Him my ſaid Son *Henry Weſton* my Executor."

That the ſaid Teſtator was ſeized in Fee of the ſaid Cloſe called *Orchard Meadow*, in the ſaid Will mentioned.

That the Teſtator died on the 6th of *April* 1705, without revoking or altering his ſaid Will; which was proved by the ſaid *Henry Weſton* the Son, in the Month of *May* following.

That it did *not appear* Whether the ſaid *Rachel Buckler* was or was not *indebted to the ſaid Teſtator otherwiſe than on Account of the Mortgage aforeſaid.*

That the ſaid *Money* NOT *having been paid*, and the ſaid *Rachel* being alſo dead, JOHN BUCKLER *Son and Heir of the ſaid Andrew and Rachel*, was on the 24th Day of *July* 1705, at a Court of the ſaid Manor, *admitted Tenant of the Premiſſes*; and did, at the ſame Court, make the following *Surrender* of the Premiſſes in queſtion, to the ſaid *Henry Weſton the Son:* Which Admittance and Surrender are ſet forth *in hæc Verba.* The Admittance is in Common Form: And the Surrender is " Of the Premiſſes, necnon
" totum Statum Jus Titulum Intereſſe Clam' et Demand'
" ſua quæcunque *tam in lege quam in æquitate* de et in
" Præmiſſis prædict' et qualibet inde parte et parcella; Ad
" opus et uſum Henrici Weſton Hæred' et Aſſign' ſu' in per-
" petuum, ſecundum Conſ' &c." Upon which Surrender the ſaid *Henry Weſton* was admitted.

That the ſaid *Henry Weſton* (the Son) having Iſſue, amongſt Others, the Leſſor of the Plaintiff (his Eldeſt Son) and a Daughter *Sarah Weſton*, did on the 27th Day of *April* 1738, at a Court of the ſaid Manor, make the following Surrender: Which Surrender is ſet out *in hæc Verba*, and appears to be a Surrender " of the Premiſſes, in com-

" mon

* P. 973. " * mon Form, by the ſaid *H. W.* To the Uſe and Behoof " of Him the ſaid *Henry Weſton*, for and during the Term " of his Life; and from and after his Deceaſe, To the " Uſe and Behoof of SARAH WESTON Daughter of Him " the ſaid *Henry Weſton*, her Heirs and Aſſigns for ever." And the ſaid *Henry* was, at the ſame Court, admitted according to his ſaid Surrender.

That the Premiſſes in the laſt mentioned Surrender called " New Cloſe," are the Premiſſes in Queſtion.

That the beforementioned ANN, the *Wife* of *Henry Weſton* the Son, was *then living*, and *did* NOT *join* in the ſaid Surrender.

That the ſaid *Sarah Weſton* afterwards intermarried with *John Mowlin:* Both of whom are *dead*, leaving the *Defendant* their *Eldeſt Son and Heir.*

That the ſaid *Henry Weſton* the Son died on the 18th of *December* 1749; having ſurvived his ſaid Daughter *Sarah.*

The ſaid *Ann* his Wife died on the 28th Day of *November* 1756.

On the Death of the ſaid *Henry Weſton* the Son, The Defendant, by his Guardian, entered; and hath been hitherto in Poſſeſſion of the Premiſſes in Queſtion.

It appeared, that, by the Cuſtom of the Manor, Copyhold Eſtates *may be intailed*, and *barred by Surrender.*

The Queſtion ſubmitted to the Judgment of the Court was—" Whether the Plaintiff, upon this Caſe, is intitled to " recover."

This Caſe was argued, on *Tueſday* the 6th of *May* 1760, by Mr. *Glynn* for the Plaintiff, and Serjeant *Stanniford* for the Defendant.

Mr. *Glynn* (for the Plaintiff) divided it into two Queſtions; *viz.*

1ſt. Whether *Any Eſtate Tail* was CREATED by the Will of Old *Henry Weſton* the Grandfather, to *Henry Weſton* the Son and *Ann* his Wife and the Heirs of their two Bodies.

2dly. If any ſuch Eſtate Tail was thereby created, Then Whether it was BARRED *by the Surrender of Henry Weſton the Son,* WITHOUT *his Wife Ann,* on 27th of *April* 1738.

1ſt Point. Firſt—He inſiſted that an *Eſtate Tail* was *created* by Old *Henry Weſton*'s Will.

He

* He argued that the Teſtator clearly conſidered this as a *Real* Eſtate, and meant to *deviſe it as ſuch*, and not as perſonal Eſtate. He was in *Poſſeſſion* of it; He had advanced near the full Value upon it; and He ſaw *no Proſpect of its being redeemed*; and He *had ſurrendered it to the Uſe of his Will.* * P. 974.

The Eſtate *paſſed* by the *Surrender*: The Will is no more than a Declaration of the Uſes of the Surrender.

And as to the Clauſe in the Will relating to *Rachel Buckler's* "*ſtanding indebted* to the Teſtator in a conſiderable "Sum of Money," It does not at all appear, *what* Pecuniary Connexions ſubſiſted between the Teſtator and Her: This might be ſome *other* diſtinct Debt, that had no Relation to this Mortgage of her Huſband's.

The *Surrender* made by *John Buckler*, the Son and Heir of *Andrew* and *Rachel*, to *Henry Weſton* the Son, is by no Means a concluſive Circumſtance. For *John Buckler* did not mean to aſſert any Right *to Himſelf*, in the Eſtate: He only meant to *confirm Henry Weſton's* Title to it.

If the Money ſhould be paid in, a Court of Equity would direct it to be *laid out in Land.*

Secondly—The Eſtate Tail could NOT *be barred* by the ſingle Surrender of *Henry Weſton* alone, WITHOUT *his Wife.* For He and his Wife took a *Joint-Eſtate* for their Lives by ENTIERTY, under the Will of old *Henry Weſton.* 1 *Inſt.* 183. Marquis of *Wincheſter's* Caſe. 3 *Co* 1. *Owen* v. *Morgan*, there cited, and reported in 3 *Co.* 5. *a.* 2d Point.

And if this be the Conſtruction as to *Freeholds*, it muſt be the ſame as to *Copyholds*: For the ſame Rule holds in Both. *Coke's Complete Copyholder* 69.

No *Bar* could ariſe from this Surrender, Whether it be conſidered as analogous to a *Fine*, or as a *Recovery.*

1ſt. Conſidering it as analogous to a *Fine*, It only makes a *Diſcontinuance.* A Surrender can't have the Effect of an *Eſtoppel.* 2 *Ro Rep.* 256. *Southcott* v. *Adams*, (2d Point of that Caſe.) It is a Deed-Poll. No Concluſion ariſes, as to the Reverſion in Fee to Himſelf.

2dly. Conſidering it as a *Recovery*, It would *not be good*, by the Caſe of *Owen* v. *Morgan*, juſt now cited: For He has aſſumed to himſelf a *different* Tenancy, from what he was intitled to.

But

* P. 975. * But Fines and Recoveries are not to be applied to *Copyholds*, or compared to *Surrenders of Copyholds*.

A *Surrender* is in a Nature of a *Conveyance*, and operates as an *Extinguiſhment*. A Surrenderor can't make a Diſcontinuance, unleſs He has a Capacity of ſurrendering *both the Inheritance and Eſtate*. *Co. Litt.* 325. *a*. But *this* Surrenderor had no Power to convey it as a Remainder: He had no Power over the Tenancy; which He took by *Entierty*. This Surrender is totally *void*: Nothing could be conveyed by it. Surrenders are upon the Foot of *Grants* or *Releaſes*: A Perſon can neither grant releaſe nor ſurrender *more than He has in him*. A *Leaſe* by the Huſband would have been void after his Deceaſe: The Tenancy is in the Wife. And thus it is, in Caſes of Waſte: So alſo of a Copyhold Manor. *Cro. Jac.* 99. Therefore this Act of the Huſband alone, *without* his Wife, is not voidable, but *void*: He could only convey an Eſtate of Freehold for his *own Life*.

Conſequently, There is a good Eſtate in the Leſſor of the Plaintiff; And it is not affected by this Surrender.

Serjeant *Stanniford*, who argued on behalf of the Defendant, previouſly obſerved, that whether this Eſtate is to be conſidered as *Copyhold*, or as *Perſonal* Eſtate, it ſtill comes to the *ſame Perſon*, *viz. Henry Weſton* the Son, who is both *Deviſee* and alſo *Executor*: And Copyhold Lands are liable to pay Debts; And it does not appear that there was ſufficient, without it, to pay the Teſtator's Debts. And He alſo took Notice of the Clauſe in old *Henry Weſton*'s Surrender to the Uſe of his Will, "That the Limitations in "his Will were to be SUBJECT TO THE CONDITIONS "*mentioned in certain Copies of Court Rolls* of the ſaid "Manor;" And this very Court-Roll of *Andrew Buckler*'s Surrender to Him is *particularly ſpecified* as One of them; By which Court-Roll and the Copy of it, the ſaid *Henry Weſton* the Teſtator was admitted to this Eſtate, *not abſolutely*, but as *ſubject to Redemption* by *Andrew* and *Rachel Buckler*: And, *Andrew* being dead when the Will was made; the Teſtator gives *Rachel* Time to redeem it, and alſo 50*l*. out of the Debt. This, He ſaid, amounted to a clear and full Proof "that the Teſtator did *not* conſider Himſelf as "abſolute Owner of this Eſtate." Beſides, the Deviſe to his Son *Henry* is only in *general* Terms: And there are *other* Eſtates mentioned in the Will, which are ſufficient to ſatisfy a Deviſe in ſuch general Terms, *without* having Recourſe to this Mortgage of Copyhold Lands.

Then He proceeded to anſwer Mr. *Glynn*, upon the two Points which He had made.

As

* As to the former, He denied that any Eſtate-Tail was created by Old *Henry Weſton*'s Will; or that the Teſtator had any ſuch Intention. He knew he was *but a Mortgagee:* And He has *not* deviſed this particular Land by *particular Words.* And He manifeſtly conſiders *Rachel Buckler* as having the *Right of Redemption.* Therefore He could not mean to intail it. And though he lived till 1705, He never foreclоſed the Equity of Redemption. * P. 976. 1ſt Point.

Neither did the Perſons who claimed under his Will, claim under the *Intail,* but as *Executor* and *Reſiduary Deviſees.* In *July* 1705, *John Buckler,* who was Heir both to his Father and Mother, ſurrendered to the Uſe of *Henry Weſton* the Son, in Fee; Who was admitted accordingly; and who accepted it as *Executor* of his Father's Will; and who lived till *December* 1749. *Ann* his Wife, who ſurvived Him near ſeven Years, did *not enter:* But the preſent Defendant entered on the Death of his Father, and hath been in Poſſeſſion ever ſince.

As to the latter, He inſiſted that although it ſhould be admitted that this Land did paſs by the Deviſe as *Real* Eſtate, and that *Henry Weſton* the Son and *Ann* his Wife were *ſeiſed of it as Deviſees,* Yet they were ſeiſed of it in ſuch a Manner, that the Surrender of it by *Henry Weſton alone, without his Wife,* was a *ſufficient* BAR. 2d Point.

Copyholds are not intailable, He ſaid, under the *Statute de Donis*; but by *Cuſtom:* And the Intail of them can be barred *only by Cuſtom:* And they are barrable, in 3 Methods only; *viz.* by *Surrender* in the Lord's Court, by *Recovery,* by *Forfeiture.*

Here, The *Wife*'s Eſtate was *no Impediment* to the Surrender. The Huſband and Wife were ſeiſed to them and to the Heirs of his Body by Her: And the Huſband and Wife took by *Moieties.* Therefore the Recovery is good as to a *Moiety.* And it is not like the Caſe of * *Owen* and *Morgan:* For there the Huſband and Wife took by *Entierty.* And † *Cuppedike*'s Caſe fully proves "that if the Huſband alone "had been vouched, it had been a good Bar." And He cited Lord *Sheffield's Caſe* v. *Ratcliffe,* in *Hob.* 334. and ſeveral other Books, (*Godb.* 300. *Palmer* 352. 2 *Ro. Rep.* 312, 333, 374, 496, 501. *Sir Wm Jones* 69. and *Jenkin's* 286.) and alſo 2 *Ro. Abr.* 394. Tit. *Recovery Common,* Let. *A. pl.* 4. to the ſame Effect. From whence he argued, that the Caſe of *Owen* v. *Morgan* was not founded upon the Wife's Intereſt in the Eſtate; but upon the Huſband's not being a good Tenant to the *Præcipe.* * 3 *Co.* 5. *a.* *Moore* 210. 4 *Leon.* 26, 93, 2 2. † 3 *Co.* 5. *b.* 6. *a.* 2 *Ro. Abr.* 395. Let. D. *pl.* 3.

He ſaid, it muſt be taken that there is, in this Manor, a Cuſtom "to ſuffer a Recovery." And this is an effectual Bar to the Eſtate Tail.

Therefore

* P. 977. * Therefore He prayed Judgment for the Defendant, as in Caſe of a Nonſuit.

Mr. *Glynn* replied.

1ſt Point. That the Eſtate is particularly deſcribed in the *Surrender to the Uſe of Old H. W.'s Will*, though not in the ſaid Will itſelf: And *Nothing appears*, to ſhew that the Teſtator meant to conſider this as Part of his *Perſonal* Eſtate.

2d Point. A *Surrender* is *not analogous to a Recovery:* It is not to have the Effect of a Recovery with double Voucher; which ſtands upon a peculiar technical Reaſon, (*viz.* the Recovery in Value, which would go to the Heir in Tail;) which Reaſon don't hold in the preſent Caſe. The Huſband can only make an Eſtate for his *own Life:* He can't affect his *Wife's* Eſtate. And her Eſtate, remaining unaffected, will *protect the ſubſequent Remainders.* Therefore this Surrender cannot operate as a Bar.

The Court took two Days Time, to adviſe:

And on *Thurſday* the 8th of *May* 1760,

Lord Mansfield delivered their Reſolution: Which was for the Defendant, on both Points; *viz.* That the Eſtate did *not paſs* by the Deviſe; and that it was *well barred*, if it had.

After having particularly ſtated the Caſe, his Lordſhip obſerved that at the Time of Old *Henry Weſton's* making the Surrender to the Uſe of his Will, he manifeſtly conſidered this as a Mortgage *ſubject to Redemption*, though forfeited: For in this Surrender He has inſerted the Words "totum "Statum Jus Titulum Intereſſe &c prædicti Henrici Weſton, "*tam in Lege quam in Æquitate*, de et in Præmiſſis." Then, by his Will, He charges theſe Lands, together with his Orchard-Meadow in *Weymouth*, for Security of the Payment of a Legacy of 200*l.* to his Son *William*. Then he mentions *Rachel Buckler's* ſtanding indebted to Him; and gives Her Time for Payment of the Debt, and 50*l.* out of it. And afterwards, by a *general* Deſcription, He gives and deviſes "All his Lands Tenements and Hereditaments within and "Parcel of the ſaid Manor of *Wyke Regis*, and alſo All other "his Lands Tenements and Hereditaments in the County of "*Dorſet*, (Such Parts thereof as are above charged for the "Payment of the ſaid 200*l.* to his ſaid Son *William*, and for "his Daughter's Annuity, ſubject thereto,) to his Son *Hen-*"*ry Weſton* and *Ann* his Wife and to the Heirs of the Body "of the ſaid Son *Henry* on the Body of the ſaid *Ann* law-"fully

" * fully begotten; and to be begotten." And He be- * P. 978.
queaths all his Perſonal Eſtate whatſoever, to his ſaid Son *Henry*; and makes Him his Executor.

The Plaintiff is the only Son and Heir of *Henry Weſton* (this Son of the Teſtator) by the ſaid *Anne* his Wife: And He claims this Parcel of Land called *New Cloſe*, as Heir of their two Bodies, in ſpecial Tail, Under the Will of his Grandfather, as being deviſed thereby under this general Deſcription.

To this Claim, thus founded on a Special Intail, Two Anſwers are given, on the Part of the Defendant. The firſt is, That it was not deviſed *as Land*, but *as Money*; it being only a Security for Money, and redeemable at that Time, by *Rachel Buckler*. (And if this be ſo, it makes an End of the Caſe.) The ſecond Anſwer is, That ſuppoſing it to be deviſed *as Land*, and ſuppoſing it to be *intailed* too, Yet an Eſtate Tail may, by the *Cuſtom* of this Manor, be *barred by a Surrender* in the Lord's Court; And that here has actually been ſuch a Surrender made by *Henry Weſton*, *ſufficient to bar the Intail*, though made by him *alone* without his Wife, and though his Wife Herſelf might not have been prejudiced by it.

As to the Conſtruction of the Will of Old *Henry Weſton*— 1ſt Point.
If it appeared that the Teſtator really *meant and intended* to deviſe this Cloſe *as Land*, it would then be a Deviſe of *Land*; the Mortgage being forfeited by Law, and the Eſtate in the Land become abſolute. But if it appears that the Teſtator meant and intended it as a Bequeſt of *Money* only, Then it would be conſidered, in a Court of Equity, as a ſpecific Bequeſt of the *Money*: And a Court of Equity would not direct the Money to be laid out in Land, without expreſs Words in the Will to ground ſuch Direction upon.

It ſeems to Me, That the Teſtator all along underſtood this to be Part of his Perſonal Eſtate; and that He meant to diſpoſe of it *as ſuch*, by this Will. He ſurrendered it as charged with a *Condition of Redemption and Re-Surrender*: And in his Will, He manifeſtly conſidered it as a Debt due from *Rachel Buckler*; and that Debt, as Part of his *Perſonal* Eſtate.

It will be neceſſary to conſider *What Species* of Property the Teſtator had in this Eſtate.

A Mortgage is a *Charge* upon the Land: And whatever would give the *Money*, will carry the Eſtate in the Land *along with it*, to every Purpoſe. The Eſtate in the Land is the *ſame Thing* as the Money due upon it. It will be *liable to Debts*; It will *go to Executors*; It will paſs by a Will *not* made

* P. 979. * made and executed with the Solemnities required by the *Statute of Frauds.* The *Aſſignment of the Debt*, or *forgiving it*, will draw the *Land* after it, as a *Conſequence:* Nay, it would do it, though the Debt were forgiven only by *Parol*; For the Right to the Land would follow, notwithſtanding the Statute of Frauds.

The Rule of Law *attaches* at the Time of the *Teſtator's Death:* No *ſubſequent* Act of the Mortgager can alter the Nature of the Property. It is the Rule of Law, that governs the Property, and leaves no Election to any Body to vary it after the Death of the Teſtator.

Though the Teſtator has not in his *Will* expreſsly mentioned this Eſtate to be redeemable, Yet he has done ſo in the *Surrender to the Uſe of his Will:* He ſurrenders it *as* liable to a Condition *in Equity*; (For at *Law*, it was become abſolute;) And there had not run above 8 or 9 Years upon this Mortgage, when he made this Surrender. So that He appears to have made the Surrender of it, only to ſubſtantiate his Claim upon the Eſtate; and upon the Face of the Surrender, plainly conſidered it as *redeemable.*

And ſo He did in his *Will* too. We muſt take it, upon the *Will*, that the Widow *Buckler* owed Him *no other* Debt but this: For de *non exiſtentibus* et de *non apparentibus* eadem eſt Ratio. He gives her Time to pay it; He gives her a ſpecific Legacy, out of it; He gives it *as a Debt*, towards Payment of his Debts and Legacies, " I give and bequeath " to my Son *Henry Weſton* All my Goods Chattels and *Per-* " *ſonal Eſtate whatſoever*, He *paying my Debts, Legacies* and " Funeral Expences." And there is Nothing to control this, but the *general* Words " All my Lands Tenements and " Hereditaments within and Parcel of the ſaid Manor &c." But his *Creditors* and *Legatees* had a *Right* to have it conſidered as *Perſonal* Eſtate.

Therefore We All agree in Opinion, " That He *meant* " to paſs it *as a* DEBT." And there is no Colour to imagine that it could be conſidered in a Court of Equity, as a ſpecific Bequeſt of Money which they would direct to be laid out in Land.

2d Point. As TO the Eſtate's being BARRED, in caſe it had paſſed by the Deviſe; There is no Doubt but that it would have been *well barred by this Surrender.*

By the Cuſtom of this Manor, intailed Copyhold Eſtates are barrable by Surrender in the Lord's Court: And *Henry Weſton* the Son has here actually made ſuch a Surrender. Though He could not bar it in *One* Form, He might do it in

* in *another*. Wherever the Tenant in Tail of a *Freehold* Eſtate could by *any* Means bar the Eſtate, there this Tenant in Tail of this Copyhold might do it by Surrender; And his Surrender ſhall *operate as a good Recovery*. * P. 980.

Conſequently, Upon *this* Point, the Leſſor of the Plaintiff can have no Title.

Therefore, *quâcunque* via datâ, the Plaintiff appears to have *no Title:* And the Defendant muſt have Judgment as in caſe of a Nonſuit.

Rule accordingly, That the *Poſtea* be delivered to the Defendant; And that Judgment be entered for Him, as in caſe of a Nonſuit.

Rex *verſ.* Benfield and Saunders.

Mr. Serj. *Nares*, Mr. *Aſton* and Mr. *Stowe* ſhewed Cauſe Why the *Judgment* againſt theſe two Defendants ſhould *not be arreſted.*

An Information had been filed againſt theſe two Perſons, together with Three others, for a Miſdemeanour: Which Information conſiſted of 4 Counts; One, for a Riot; Another, for publiſhing a Libel; A third, for a Riot and Libel; And the 4th and laſt, as hereafter follows.

The other Three Defendants were acquitted of the whole Information.

Benfield and *Saunders* were acquitted of all the Reſt of the Information, excepting this 4th Count: But they were found Guilty of this Count, which is as follows, *viz.*

That they the ſaid *Thomas Benfield*, *Thomas Wills*, *Thomas Kyte*, *John Saunders*, and *Thomas Jones*, being ſuch Perſons as aforeſaid, and moſt unlawfully wickedly maliciouſly and unjuſtly deviſing deſigning contriving and intending (as much as in them lay) further to *diſturb moleſt and diſquiet* Him the ſaid *Daniel Cooke*, and to *deſtroy his domeſtic Peace and Happineſs in his Family, and the Comfort He had in his ſaid two Children John and Jane Cooke, and to hurt and injure* Him the ſaid Daniel Cooke *in his Trade and Buſineſs* of a Grocer, which He the ſaid *Daniel Cooke* then and there, to wit, at *Cheltenham* aforeſaid, in the County of *Glouceſter* aforeſaid, exerciſed, and for a long Time before there had exerciſed and followed with great Credit and Reputation, and thereby to reduce him the ſaid *Daniel Cooke* to Want and

* P. 981. * and Poverty; and alſo moſt unlawfully wickedly maliciouſly and unjuſtly deviſing, deſigning, contriving and intending to *traduce ſcandalize and vilify* THEM *the ſaid* JOHN COOKE *and* JANE COOKE, Son and Daughter of the ſaid *Daniel Cooke*, being Perſons of good Name Fame Credit Character and Reputation, and being Perſons of honeſt chaſte and virtuous Lives and Converſation, and being then in great Credit and Eſteem with all the honeſt Liege Subjects of our ſaid preſent Sovereign Lord the King with whom they the ſaid *John Cooke* and *Jane Cooke* were acquainted; And alſo moſt unlawfully unjuſtly wickedly and maliciouſly deviſing deſigning contriving and intending *to repreſent ſuggeſt and make it be believed and thought that the ſaid* JOHN COOKE *was a diſhoneſt immoral and ill diſpoſed Perſon, and that the ſaid* JANE COOKE *was a lewd wanton diſſolute diſorderly and ill-diſpoſed Perſon and had been guilty of Incontinency Lewdneſs Debauchery and Fornication, and alſo to make it be believed and thought that She the ſaid* Jane Cooke *had been got with Child of a Baſtard and had been delivered of a Baſtard Child at* London *in order to conceal the Birth thereof*; and alſo deviſing and contriving moſt unlawfully and unjuſtly to *hurt* and *injure* THEM *the ſaid* JOHN COOKE *and* JANE COOKE *in* THEIR *good Name Fame Credit Character and Reputation, and to expoſe the ſaid* JOHN COOKE AND JANE COOKE *to Shame Infamy Scandal and Diſhonour, and to bring* THEM *into Diſgrace Hatred and Contempt with all the Liege Subjects of our ſaid preſent Sovereign Lord the King knowing* THEM *the ſaid* JOHN *Cooke and* JANE *Cooke; and the ſooner to complete perfect and bring to Effect their ſaid moſt unlawful wicked and unjuſt Purpoſes aforeſaid*; THEY the ſaid *Thomas Benfield* the Younger, *Thomas Wills*, *Thomas Kyte*, *John Saunders*, and *Thomas Jones*, afterwards, *viz.* upon the 26th Day of *May* in the ſaid 32d Year of the Reign of our ſaid preſent Sovereign Lord the King, in the Evening of the ſame Day, with Force and Arms, at *Cheltenham* aforeſaid, in the County of *Glouceſter* aforeſaid, to wit *in the public Street and King's Common Highway there, before and near unto the Dwelling-houſe of him the ſaid* DANIEL COOKE there ſituate, with *loud Voices* and in a *public open and ludicrous Manner*, in the Preſence and Hearing of divers Liege Subjects of our ſaid preſent Sovereign Lord the King, did unlawfully wickedly and maliciouſly SING ſay ſpeak utter *publiſh* and pronounce, and did cauſe to be SUNG ſaid ſpoken uttered *publiſhed* and pronounced divers other *falſe ſcandalous malicious obſcene* and *libellous* SONGS Verſes and Matters, *of and concerning the ſaid* JOHN *Cooke and* JANE *Cooke*, greatly reflecting upon the *Characters and Reputations* of THEM the ſaid JOHN *Cooke and* JANE *Cooke:* In One of which ſaid *libellous Songs*, of and concerning the ſaid *Jane Cooke*, were contained divers falſe ſcandalous infamous and malicious Words, Matters and

* and Expreſſions, according to the Tenor following, that * P. 982.
is to ſay, "There are two People in *Cheltenham* Town;
"The One, a Luſty Spark: They Both do take Delight in
"*Game*; Each One doth keep a Park. In One, there is a
"*Buck*; In the other, there's a *Doe*;" (meaning the ſaid *Jane Cooke*:) "And if you can but Favour get, *A Hunting*
"*you may go.* But if that She" (meaning the ſaid *Jane Cooke*)
"is going proud, and like to be at Rut; They turn Her,"
(again meaning the ſaid *Jane Cooke*,) "into a Neighbour's
"Park; And there to take the Buck. And when that He
"has done his Beſt, And this fine *Doe*," (again meaning the ſaid *Jane Cooke*,) "is cloy'd; Then up She goes to *London*
"Town, her Young One for to hide;" (meaning to hide a Baſtard Child of Her the ſaid *Jane Cooke*) "And when She"
(again meaning the ſaid *Jane Cooke*) "has been there a
"While, If that You will but mind, Then out She" (again meaning the ſaid *Jane Cooke*) "cometh from that Park, and
"leaves her *Fawn*," (meaning a Baſtard Child of the ſaid *Jane Cooke*) "behind. But yet a while in Town muſt ſtay; till
"all Things ſafe and ſound: Then, Home She," (again meaning the ſaid *Jane Cooke*,) "comes, to her own Park, to
"take the other Round." And in *One other* of the ſaid *libellous Songs*, of and concerning the ſaid JOHN *Cooke*, were contained divers other falſe ſcandalous infamous and malicious Words Matters and Expreſſions, according to the Tenor following, that is to ſay, "Come all you jolly Wonters bold;
"and take a turn with me: Such Sport I'll ſhew, each Night, (though cold,) "before you ne'er did ſee. And a
"Wonting We will go, We'll go, We'll go; And a Wont-
"ing We will go. My Maſter *Johnny Moll*" (meaning the ſaid JOHN COOKE) "has got ſuch Tricks enough in Store;
"His Fame" (meaning the Fame of Him the ſaid JOHN COOKE) "is ſpread from Eaſt to Weſt, on Shutters, Poſts
"and Doors &c. When Night has ſpread her ſable Veil,
"and all Things ſafe and ſure, He'll (meaning that the ſaid JOHN COOKE will) "ſhew You Tricks; He'll" (again meaning the ſaid JOHN COOKE will) "never fail; if you'll
"but nick the Hour, &c. We hire Men to catch our Wonts;
"who *ſteal* them" (meaning the Wonts or Moles,) "when
"'tis done. We love our Puggs; We dearly hugg: And is
"not this good Fun? &c. For every Trap has got a Trick,
"to make the Game his own: The like was never known
"before, in Country, City or Town, &c. No begging Diſh-
"Clout e'er ſhall wipe away ſo great a Blot: For all their
"Talk, and all their Balk, it will not be ſo ſoon forgot,
"&c. And the Fame of *Johnny*'s Moll" (meaning the ſaid JOHN COOKE) "is ſeen on every Door: Each Yard, each
"Gate, each Stile, each Poſt, ſhall ſpread it more and more.
"And a Wonting We will go, We'll go, We'll go; And a
"Wonting We will go." To the great Damage, Scandal, Infamy and Diſgrace of the ſaid DANIEL COOKE, JOHN

* P. 983. * COOKE, and JANE COOKE; In Contempt of our ſaid preſent Sovereign Lord the King and his Laws; To the evil and pernicious Example &c; and againſt the Peace &c.

Upon this Count only, and the Matters therein charged, the Two preſent Defendants were found Guilty.

The Motion in Arreſt of Judgment, made by Mr. *Aſhurſt* on *Friday* 26th of *April* laſt, and now ſupported by Mr. *Morton*, as well as Himſelf, was grounded upon three Objections.

1ſt. That an Information or Indictment will not lie for publiſhing Two *diſtinct* Libels, *upon* Two *diſtinct Perſons*; any more than an Indictment will lie, for an *Aſſault* UPON TWO: And that ſuch an Indictment is not good, was determined in this Court in *Tr.* 1730, 3, 4 G. 2. in the Caſe of *Rex* v. *Clendon*, reported in 2 *Strange* 870, and 2 *Ld. Raym.* 1572. The Reaſon is, becauſe theſe are *diſtinct Offences*, and require different and diſtinct Judgments, and may require different and diſtinct Fines: And therefore they can *not* be *joined* in One and the ſame Indictment; but there ought to be a *ſeveral* Indictment for *Each*. The Libel upon *John Cooke* was an abſolutely diſtinct and quite different Libel from that on *Jane*.

In *Carthew* 226. 227. *The King* v. *Roberts*, *P.* 4 *W.* & *M. B. R.* The whole Court were of Opinion, after great Deliberation, That an Information againſt a Ferryman, "for "taking more than the uſual Rate from *divers* Perſons, for "the Paſſage of themſelves and their Cattle," was too general and uncertain: And *per Holt*, Ch. J. "In every ſuch Infor- "mation, a *ſingle Offence* ought to be laid and aſcertained; "becauſe *every Extortion from every particular Perſon* is a "*ſeparate* and *diſtinct* Offence; And therefore they ought NOT "*to be accumulated under a* GENERAL *Charge*; becauſe Each "Offence requires a *ſeparate and diſtinct Puniſhment*, accord- "ing to the Quantity of the Offence; and 'tis not poſſible "for the Court to proportion the Fine or other Puniſhment "to it, unleſs it is ſingly and certainly laid." And that Judgment was arreſted.

The Anſwer given to this firſt Objection, by the Counſel for the Proſecutors, was, "That the Caſes cited are *diſtinct* "*Offences:* Whereas the Whole of *this* is but *One ſingle* Of- "fence." And as to the Caſe of *Rex* v. *Clendon*, there is in *Weſt's Symboleography*, a Precedent of an Indictment againſt One for aſſaulting and beating *Two* in the Highway, to the Intent to have killed or robbed them. *Part* 2d. Title *Indictments*, §. 191.

THE COURT thought that this 1ſt Objection had received a ſufficient Anſwer, *in both reſpects*. For they looked upon this to be ONE Offence: The Giſt of the Charge is *Singing* theſe Songs, in the Manner and with the Intent charged in the Information; And ſinging them at the Father's

* ther's Door, with Intent to discredit Him and his Children, and disturb his domestic Peace and Comfort. * P. 984.

And as to the Case of * *The King* and *Clendon*, They treated it as a Case that was not well considered; and held it *not to be Law*. Can not the King call a Man to Account for a Breach of the Peace; because he broke *two* Heads instead of One? How many Informations have been for Libels upon the King *and his Ministers?* This is a Prosecution in the *King's Name*, for the Offence charged: It is *not* an Application at the Suit of each particular *Party* injured. It is not like an *Action*; where each Person injured is, respectively, to recover *separate Damages*. * 2 *Strange* 870. 2 *Ld. Raym.* 1572.

Therefore this 1st Objection was *over-ruled*.

The 2d Objection upon which this Motion was founded, and which was now further enforced, was "That *several* "*distinct Defendants*, charged with *several and distinct Of-* "*fences*, can *not* be *joined together* in the same Indictment or "Information; because the Offence of *One* is *not* the Offence "of the *Other:* And the *present* Charge is made up of *sepa-* "*rate and distinct Offences*; for which the several Defendants "can no more be joined, than several Defendants can be "charged with † *Perjury*, or being ‡ *Scolds*, or keeping ‖ "*open Shop* on Fast-days, or exercising a § *Trade* without "having served an Apprenticeship; in all which Cases, the "Offence of the *One* cannot be considered as the Act of the "*Other*." So here, the Publication by *Benfield* was not a Publication by *Saunders*; nor *e converse*. † 2 *Strange* 921. *Rex* v. *Philips et al'*: Where 6 Persons were jointly indicted for *Perjury* and the Judgment was arrested *Palmer*, 535. was there cited, and many other Cases; And the Point was settled. ‡ 2 *Strange* 921. S. C. where the Case of Perjury was compared to the Case of *Scolds*; for which an Indictment will not lie against Two; *Regina* v. *Hodson et al'*, *Tr.* 6 *Ann.* ‖ 6 Mod. 210. *Anonymous.* § 1 *Strange* 623. *Dominus Rex* v. *Weston et al'*.

The Answer given to this 2d Objection was, "That several "Defendants *may* be *joined* in One and the same Indict- "ment or Information; if the Offence WHOLLY arises from "such a *joint Act* as is criminal in itself, without any regard "to any particular personal Default of the Defendant which "is peculiar to Himself: As, for Instance, it may be joint "for keeping a Gaming House *&c*; but not for exercising "a Trade without having served an Apprenticeship, because "Each Trader's Guilt must arise from a Defect peculiar to "Himself."

2 *Hawk. P. C.* 140. is clear and express in this Distinction.

Style 244. *Paul Williams and his Wife* against *the Custodes*, was a joint Indictment for *Words spoken by Both:* And the Court held the *Joint*-INDICTMENT good; though a joint *Action* on the Case could not have been brought against them.

* P. 985. * *Style* 312. *Cuſtodes* v. *Tawny and Norwood, jointly* indicted for blaſphemous Words ſeverally ſpoken by them: *Roll* Ch. J. held the Indictment *good* enough, though joint.

Can not *ſeveral* Perſons join in *ſinging* One and the *ſame Song?* Forty People may join in the *ſame Chorus.* And if ſuch Song or Chorus be libellous, the Doing ſo is *one joint Act*, criminal *in itſelf*, without regard to any peculiar perſonal Default.

The COURT thought this 2d Objection to have likewiſe received a ſatisfactory Anſwer. They held this to be an *entire Offence*; One *joint Act*, done by both; They both joined in the Act of Singing this libellous and ſcandalous Matter, in the public Street, at the Father's Door, with Intent to diſcredit Him and his Children. And Whether it be two Songs, or One; or a firſt and ſecond Part of the ſame Song; or ſeparate Stanzas, One on *John*, another on *Jane*; Yet it is one entire Offence: And the more there are that join in it, the greater is the Offence.

It is *not* like the Caſe of *Perjury*. Where the Perjury of One is not the Perjury of another; but the Perjury is a *ſeparate* Act in Each: Whereas this is a *joint Act*.

The 3d Objection on which the Motion in Arreſt of Judgment was grounded, was "That this is an entire *general* "Verdict upon the *whole* 4th Count: And yet, the *latter* "*Song* contained in it, (namely, the Song upon *John Cooke*,) "contains *no libellous Matter*, at all. Conſequently, no "Judgment can be entered up for the Proſecutors."

The Anſwer given to this 3d Objection was, Firſt "That "the latter Song *is libellous*; and expoſes this *John Cooke* to "*Ridicule*." However, Secondly, If either of the two Songs be libellous, the Judgment will be good and well warranted: For upon *Indictments* or *Informations*, the Court will give Judgment on *that Part* which is indictable. And it is *not* like the Caſe of an ACTION, where *general Damages* are given, and One of the Counts appears to be bad; in which Caſe, the Plaintiff in the Action can not indeed have Judgment: But the Reaſon why it is ſo in *Actions*, don't hold in Indictments or Informations.

The COURT over-ruled this 3d Objection alſo; Holding this latter Song to be libellous and defamatory; and likewiſe, that if this Part of the Charge had not been ſo, it would, in an *Information* or *Indictment*, only go towards leſſening the Puniſhment; but would not be a ſufficient Reaſon for arreſting the Judgment.

Wherefore, upon the Whole,
Per Cur. unanimouſly,
The RULE (to ſhew Cauſe Why the Judgment ſhould not be arreſted) was DISCHARGED.

Rex

* Rex *verſ.* Inhabitants of Kniveton.

* P. 996.

Friday 9th *May* 1760.

See this CASE *abridged*, in the TABLE; and *at large* in the Quarto-Edition of my SETTLEMENT CASES, pa. 499. N°. 159.

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* Rex *verſ.* Inhabitants of Berwick St. John.

*P. 988.

Monday 12th *May* 1760.

This CASE is *abridged* in the TABLE: And it may be ſeen *at large*, in the Quarto-Edition of my SETTLEMENT CASES, Page 502. N°. 160.

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* Rex *verſ.* Vandewall Eſq.

* P. 991.

Tueſday 13th *May* 1760.

THE only Queſtion in this Caſe was Whether the *Lord* "*of a Manor* is *aſſeſſable to the* POOR-*Rates*, under 43 "*Eliz. c.* 2. § 1. for the QUIT-RENTS, HERIOTS, *and* "CASUAL PROFITS *of his Manor.*"

It firſt came before the Court, on *Thurſday* 21ſt *June* 1759, upon a Motion to quaſh an Order of Seſſions which had confirmed ſuch a Rate made upon Mr. *Vandewall*, Lord of the Manor of *Aldenham*; from which Rate, He had appealed to them. But the Caſe not being ſtated with ſufficient Particularity, upon this firſt Order of Seſſions, It was ordered (on *Wedneſday* 4th *July* 1759,) "That the Order, together with "the *Certiorari*, ſhould be ſent back to the Seſſions, to be "ſtated more fully, as to the Matters of Fact, and afterwards to be returned again to this Court."

This was accordingly done: And the new State of the Caſe was as follows, *viz.*

That *Samuel Vandewall* Eſq; was charged to the Poors Rate of the Pariſh of *Aldenham*, bearing Date the 28th of *March* 1759, in the Manner following, that is to ſay, "For the Tithe, 3*l.* 15*s.* *For the* MANOR, 2*l.* 5*s.* *More*, "*for the* QUIT-RENTS, 10*s.* 6*d.* More, For the Woodlands, 10*s.*"

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That

That it appeared that the ſaid *Samuel Vandewall* did *not*, at the Time of making this Rate, hold or occupy *any* Lands Houſes Tithes Coal-mines or ſaleable Underwoods within the ſaid Pariſh, Parcel of or belonging to the Demeſnes of the ſaid Manor or otherwiſe, within the ſaid Pariſh; Except the Tithes for which the ſaid *Samuel Vandewall* is aſſeſſed and charged in the ſaid Rate at 150*l. per Annum*, and the Woodlands for which the ſaid *S. V.* is aſſeſſed and charged at 20*l. per Annum*.

That the LANDS *from which the Quit-Rents ariſe*, for which the ſaid *Samuel Vandewall* is aſſeſſed and charged in the ſaid Rate, are *Free and Copyhold Lands* HOLDEN *of the ſaid Manor*, and in the *Occupation* of divers Perſons *Tenants of the ſaid Manor*, or their Leſſees or Under-tenants, WHO ARE RESPECTIVELY CHARGED AND ASSESSED FOR THE SAID LANDS, in the ſaid Rate, *as Occupiers thereof*, according to the RACK *Rent* of the ſaid Lands: But that the ſaid QUIT-RENTS are NOT *otherwiſe charged* in the ſaid Rate, than by the Charge on the ſaid Mr. *Vandewall* under the Article of Quit-Rent.

* P. 992. * That the PROFITS *of the ſaid Manor*, excluſive of the ſaid Quit-Rents, ariſe by and conſiſt of *Eſcheats*, *Heriots*, *Reliefs*, and *Fines* on the Admiſſion of Copyhold Tenants on Deaths and Purchaſes, and other *Caſualties* ariſing within the ſaid Manor: Which *together with the ſaid Quit-Rents*, are by Computation *communibus annis* 111*l per Annum*; *viz.* the Quit-Rents 21*l.* and the *other Profits* of the Manor 90*l. per Annum*.

That it does *not* appear that the ſaid *Quit-Rents* and the ſaid Manor of *Aldenham*, or either of them, HAVE EVER BEEN RATED to the Poors Rate of the ſaid Pariſh of *Aldenham*, *till within two Years* laſt, and ſince the ſaid *Samuel Vandewall* purchaſed the ſame, (which was in or about the Year 1754.)

Mr. *Norton* moved (on *Friday* 1ſt *February* 1760,) to quaſh this Order *confirming* the Rate (as the former had done; and obtained a Rule to ſhew Cauſe.)

On *Thurſday* 24th *April* 1760, Mr *Gould* and Mr. *Knowler* ſhewed Cauſe againſt its being quaſhed: And they cited ſome looſe Scraps of Caſes, relating to the Subject; *viz. Comberb.* 62. and again 264. both Anonymous, and *Hull*'s Caſe in *Carthew* 14. and likewiſe 2 *Ld. Raym.* 1280 *Dalton* 165 (in the large Folio Edition.) 3 *Keble* 540. S. C. *The Corporation of Wickham* againſt *the Mayor*. 2 *Bulſtr.* 354. Sir *Anthony Earby*'s Caſe; 2 *Inſt.* 703. and *Jeffrey*'s Caſe, 5 *Co.* 67, *b.*

Mr.

Mr. *Norton* and Mr. *Field*, on the other Side, argued that the Quit-Rents and Caſual Profits of a Manor were not rateable to the Poors Tax, within either the Words or Meaning of 43 *Eliz. c.* 2. no more than *Ground-Rents* are. *Quit-Rents* have been *already* rated to the full, in the Hands of the reſpective Occupiers: So that this is Rating the ſame Thing *doubly*. And the *Caſual* Profits are quite *uncertain*; and can never be conſidered as that Sort of Fund, out of which the Poor of a Pariſh are to be ſupported.

The COURT took ſome Days to conſider of the Point; as it was a very general and extenſive Queſtion; but not from any great Doubt that they had about it.

On *Tueſday* 13th *May* 1760.

Lord MANSFIELD very ſhortly declared their Opinion "That theſe Quit-Rents and Caſual Profits of the Manor "are *not* rateable to the Poors Tax:" Which, he ſaid, was ſo clear, that there was no Need to enter into Reaſonings * about it. They were *never rated before* in *this* Pariſh; and, *as far as appears to Us*, the Rating ſuch Quit-Rents and Caſual Profits has never been *at all* attempted before: And there is no Colour for this Attempt now, after more than a Century and an Half ſince the making of the Act of Parliament upon which it is grounded. * P. 993.

RULE made abſolute, for quaſhing the Rate and the Order of SESSIONS confirming it.

Rex *verſ.* John Spragg and Mary Elizabetha Spragg.

Wedneſday 14th *May* 1760. *V. ante* 930. (the firſt Attempt towards this Motion.)

THE Defendants (who were Father and Daughter) had been convicted of a CONSPIRACY, upon the following Indictment—That *John Spragg* of *&c.* Mill Wright, and *Mary Elizabetha Spragg* of *&c.* Single-Woman, being Perſons of an evil Mind and wicked Diſpoſition, and deviſing and intending to deprive One *Walter Gilmore* of his good Name Credit and Reputation, and alſo to ſubject the ſaid *Walter Gilmore*, without any juſt Cauſe, to the *Loſs of his* LIFE and Forfeiture of his Goods and Chattels Lands and Tenements, upon the 31ſt Day of *July* in the 30th Year of the Reign of our Lord *George* the Second King of *Great Britain*, and ſo forth, and at divers other Times and Days thentofore, at *New Sarum* in the County of *Wilts*, and at divers other Places within the County aforeſaid, *wickedly* and *malicioufly* did CONSPIRE combine and agree among themſelves *to indict and cauſe to be indicted* the ſaid *Walter Gilmore*, for A Crime or Offence liable by the Laws of this Kingdom to be puniſhed *capitally*, and

and to proſecute the ſaid *Walter Gilmore* upon ſuch Indictment. And the Jurors aforeſaid, upon their Oath aforeſaid, *alſo preſent*, That the ſaid *John Spragg* and *Mary Elizabetha Spragg*, ACCORDING TO *the* CONSPIRACY *Combination and Agreement* AFORESAID *between them as aforeſaid* upon their Oath aforeſaid, *alſo preſent*, That the ſaid *John Spragg* and *Mary Elizabetha Spragg*, ACCORDING TO *the* CONSPIRACY *Combination and Agreement* AFORESAID *between them as aforeſaid* BEFORE HAD, afterwards, to wit on the ſaid 31ſt Day of *July* in the ſaid 30th Year of the Reign of our ſaid now Lord the King, at the Seſſion of *Oyer* and *Terminer* of our ſaid Lord the King then holden at *New Sarum* aforeſaid in and for the ſaid County of *Wilts*, before the Honourable Sir *Richard Adams* Knt. One of the Barons of His Majeſty's Courts of Exchequer, *Edward Willes* One of His ſaid Majeſty's Serjeants at Law, and Others their Fellows, Juſtices of our ſaid Lord the King aſſigned by Letters Patent of our ſaid Lord the King under the Great Seal of *Great Britain* [*prout* in the ſaid Letters Patent commiſſioning them to hear and determine,] by the Oath of [naming the Grand Jury,] good and lawful Men of the County aforeſaid, then and there ſworn and charged to enquire for our ſaid Lord the King for the Body of the ſaid County, FALSELY, *wickedly* and *maliciouſly*, and without any reaſonable or probable Cauſe, *did indict* and cauſe to
* P. 994. * be indicted the aforeſaid *Walter Gilmore*, by the Name of *Walter Gilmore* late of the Burrough and Town of *Marlborough* in the County of *Wilts* Bookſeller and Stationer, for that he, unlawfully and unjuſtly deviſing and fraudulently intending to get and obtain to Himſelf unjuſt Lucre, and to defraud our preſent Sovereign Lord King *George* of certain Duties granted by certain Statutes lately made and provided and payable to our ſaid Lord the King, and to diminiſh the public Revenue in this Behalf, after the making the Statutes in ſuch Caſe lately made and provided, and after the ſecond Day of *Auguſt* in the Year of our Lord 1726, that is to ſay, on the 3d Day of *May* in the 29th Year of the Reign of our Sovereign Lord *George* the Second by the Grace of God of *Great Britain France* and *Ireland* King Defender of the Faith, at the Burrough and Town aforeſaid in the County aforeſaid, by Force and Arms, unlawfully knowingly fraudulently and FELONIOUSLY did COUNTERFEIT AND FORGE A STAMP to reſemble a certain Stamp which had before been there duly provided made and publiſhed in Purſuance of the Statutes in ſuch Caſe made and provided, and which was then and there uſed in Purſuance of the ſaid Statutes, to ſtamp Vellum Parchment and Paper charged, by Virtue of the ſaid Statutes in ſuch Caſe made and provided, with the Payment to our ſaid now Lord the King, of the Duties of 6*d.* *and* 6*d.* thereby then and there to defraud our now ſaid Lord the King of the Duties of 6*d.* and 6*d.* granted

ed by the Statutes in that Behalf lately made and provided, and then payable to our ſaid now Lord the King; againſt the Form of the Statutes in ſuch Caſe made and provided, and againſt the Peace of our ſaid now Lord the King his Crown and Dignity. And alſo—[laying, by another Count, the Counterfeiting the two Stamps, by the ſaid *Gilmore*, another Way:] And alſo that—[It then goes on, and charges that they indicted *Gilmore* with *knowingly* UTTERING two ſuch Counterfeit Sixpenny Stamps.] And that the ſaid *Gilmore*—[laying the *uttering* them another Way.] And that the ſaid *Gilmore*—[Then follow other Counts laid by them againſt him, for counterfeiting and knowingly uttering *treble Sixpenny* Stamps.]

The *preſent Defendants*, *Spragg* and his Daughter, were *convicted* at the Aſſizes, upon this *Indictment for the Conſpiracy*, laid in the Manner juſt mentioned. However, no Judgment was *there* given; but it was *adjourned*, at the firſt and alſo at the ſubſequent Aſſizes, "quia Curia nondum advi-"ſatur." The *Record* of this Conviction was at firſt removed, WITHOUT *their Perſons:* For which Reaſon, the * former Motion could not proceed. * *V. ante* 930.

But this Omiſſion was afterwards rectified: The Record was now † removed by *Certiorari*; and the Defendants were alſo *brought up by Habeas Corpus.* Whereupon, on *Saturday* 26th of *April* 1760, Mr. *Serj. Davy* moved for the Opinion of *this* Court; or, (in Effect) in *Arreſt of Judgment*, (the Defendants being *preſent* in Court.) † *V. ante* 931.

* He made two Objections: *Viz.* * P. 995.

(1ſt.) It is not alleged *in the Charge itſelf*, "That the "Defendants conſpired FALSELY to indict *Gilmore*;"

(2dly.). Nor does it appear, *in the ſaid Charge, of what particular Crime or Offence* they conſpired to indict him. 'Tis only charged in *general*, "That they did wickedly and "maliciouſly (without adding *falſely,*) conſpire to indict and "proſecute him for a Crime or Offence liable to be capi-"tally puniſhed by the Laws of this Kingdom."

BOTH theſe Matters are *eſſentially neceſſary*; and *can not be ſupplied* by any thing that goes before or comes after.

Firſt Point. CONSPIRATORS are thoſe only who conſpirate Themſelves FALSELY and maliciouſly to indict or cauſe to indict. The Statute of 33 *E.* 1. intitled "a De-"finition of Conſpirators."—) defines Conſpirators in theſe very Terms. 1 *Hawk. P. C.* 189. 2 *Inſt.* 562. *Regiſter* 134. *a. b.* 135. accordingly. *F. N. B.* Title *Writ of Conſpiracy*, *folio* 114. in Old Edit. (260. in *Hale*'s Edit.) accordingly. 1ſt Point.

So,

So, *Raſtal's Entries* 123 to 127. Title *Conſpiracy*. So, *Co. Entries* 109. Title *Conſpiracy*. And *Pulton* 232. *a*. 233. *b*. but particularly 232. *b*. The *Writ of Conſpiracy*. So likewiſe it is ſaid by Juſtice *Richardſon*, in *Tailor* and *Towlin's* Caſe, *Godbolt* 444. All theſe Authorities prove that the Words "FALSELY *and maliciouſly*" are neceſſary, even in a *Count*.

Hale's Hiſt. P. C. 2d Vol. *pa.* 183, ſays "That the ſame "Certainty is required in an *Indictment* for Goods, as in "Treſpaſs for Goods; And that Certainty is much more "neceſſary in an *Indictment* than in Treſpaſs." 2 *Hawk. P. C.* 225. *c.* 25. § 59. proves alſo that Indictments muſt be certain. *Weſt's Precedents* 2*d Part*, Title *Indictments and Offences*, *pa.* 102. *b.* § 97. is an Indictment for a Conſpiracy *falſely &c*, to indict.

The preſent Indictment is only "That they *wickedly and* "*maliciouſly* conſpired to indict this Man:" Which may be true; and yet it might not be FALSELY. It muſt be *both* malicious *and* falſe; to make it indictable as a Conſpiracy.

The Offence conſiſts in the *unlawful Agreement* to indict *falſely* and maliciouſly: And ſuch an unlawful *Agreement* "maliciouſly to indict FALSELY," would be indictable, though never carried into Execution. But Nothing more than the malicious Agreement "*to indict* this Man" appears in the *Charge* itſelf of this Indictment.

* P. 996. 2d Point.

* Second Point. As the *Charge* itſelf is only *general*, The ſetting forth the Indictment *verbatim*, *afterwards*, can not help this *Defect in the Charge*.

* *V.* 24 *E.* 3. *pl.* 34 *to* 34. *b.* accordingly. And ſee this villainous Judgment at large, in 3 *Inſt.* 143.

There are two Inſtances of * *villainous* Judgment being awarded: 27 *Aſſize*, *pl.* 59. *fo.* 141. *b.* (by Inqueſt;) 46 *Aſſize*, 11. *fo* 307. *a* (by Indictment.) But in neither of them does it appear that the Conſpiracy was for a *Capital* Offence: It is only ſaid "That they were *attainted for Con-* "*ſpiracy*."

Hawk. P. C. Lib. 1. *c.* 72. § 9. under the Title *Conſpiracy*, ſays "That he who is convicted at the Suit of the *King*, of "a Conſpiracy to accuſe Another of a Matter which may "touch his Life, ſhall have the *villainous* Judgment, which "is given by the Common Law and not by any Statute." And the *villainous* Judgment is certainly the proper Judgment, where the Conſpiracy is "to indict for a *Capital* "Crime." But then the Capital Offence ought to be EXPLICITLY ſet forth: "A Crime liable to be puniſhed Ca-"pitally is not enough, without ſpecifying WHAT Capital "Crime." For this is a *Matter of Law*: And therefore the *Jury* are not the proper Judges of *this*. And the Want of this

this Allegation, if it be omitted in the *Charge* of the Conſpiracy itſelf, can not be *ſupplied* by any thing that precedes or comes after.

The CONSPIRACY *itſelf* is the Offence indictable, *though no Indictment* be drawn up or found, or any Thing done in Purſuance of ſuch Conſpiracy. And *if* there was *no ſuch* Conſpiracy, then there could be no Indictment *according* to it. So that the *Charge* itſelf is here *inſufficient*. But if theſe ſubſequent Words *could* be connected with it, yet at moſt, it is a Charge by Way of IMPLICATION only; *not* a clear *direct poſitive* Charge.

He therefore inſiſted upon theſe two Things:

1ſt. This is a Charge of a mere *Conſpiracy* "to indict" *only*; not of a Conſpiracy to indict FALSELY: And if it be not good, no Judgment can be given upon this inſufficient Indictment.

2dly. It cannot be made good by any IMPLICATION, if not *poſitively* and *directly* alledged at firſt. 2 *Hawk. P. C. pa.* 227. *c.* 25. § 60. is expreſs to this Purport. *Hale H. P. C. 2d Vol.* 182, 183. 4 *Co.* 44. *b. Vaux*'s Caſe, (for poiſoning *Nicholas Ridley.*) *Staundford P. C. Lib.* 2. Title *Enditement*, *c.* 31. *pa.* 96. *b.* is expreſs "that an Indictment *is not good*, "which muſt have an Argument or Implication to *make* it "good." *Certainty* in Indictments is the Subjects Security.

* The Precedents in *Tremaine* 82 *and* 85. are not ſuch Precedents as that any Thing can be collected from them. * P. 997.

Mr. *Gould*, *contra*, *pro Rege*. The Term "*Conſpiracy*" is always taken in *malâ parte*. So it appears by the Regiſter. 1ſt Point.

There is but One Count in this Indictment; And the *Whole* of it muſt be TAKEN TOGETHER, as *One Charge*: It is not to be ſeparated and divided, One part of it from another. It conſiſts of the Inducement, the Charge itſelf, and the recited Indictment, (which is ſet forth *verbatim.*)

This is an Indictment at *Common* Law. 2 *Inſt.* 562. ſays "The Statute of 33 (or as he ſays it really was, the 21) *Ed.* "1. intitled A Definition of Conſpirators, is in *Affirmance* "of the *Common* Law."

In 6 *Mod.* 186. *Rex et Regina* v. *Beſt*, *per Holt*—"A Con-"ſpiracy, *latè loquendo*," or a Confederacy *to charge one falſe-"ly* (without more) *is a Crime*: though it be not an Indict-"ment for a formed Conſpiracy, *ſtrictly* ſpeaking; which re-"quires an Infamous Judgment and Loſs of *liberam Le-"gem.*"

No

No *Villainous* Judgment has been given, ſince the Time of *E.* 3.

In *F. N. B. fo.* 253. 8vo. *Edit.* of 1704. (and alſo of 1718.) The Form of the Writ is "*Oſtenſur' Quare* Conſpi- "ratione inter Eos præhabitâ, præfat' A de &c *indictari*, et "ipſum eâ occaſione capi &c, *falsò* et malitioſè procura- "verunt; ad &c, et contra &c provis." So that there, the "*falſely and maliciouſly*" is applied to the *Indictment not* to the *Conſpiring*. 2 *Inſt.* 562. The Caſe of *Welbye* (for citing in the Spiritual Court,) does *not* charge the Conſpiracy to be falſe; but *only* malicious.

1 *Hawk. P. C. c.* 72. *pa.* 189 to 191, ſhews that if there be a *Conſpiracy*, it is puniſhable in an exemplary Manner. *Conſpiracy*, *ex vi Termini* only, is indictable.

Tremaine's Entries, 85. *Rex* v. *Freemen*, only charges "That illicitè diabolicè nequiter et malitioſe conſpiraverunt (to charge
* *V. ante.* "with an Attempt to bugger,) *without the Word* FALSO." It is *not neceſſary* to apply the "falſò et malitioſè" to the *Conſpiring*. So that the "falſely wickedly and maliciouſly" does here come in, in its *proper* Place.

Conſequently, here *is ſufficient Certainty*. It appears, and is found, "That they did wickedly and maliciouſly conſpire "falſely to indict this Man." And this is an Indictment at Common Law.

* P. 998. * 3 *Inſt.* 143. in making the lawful Acquittal of the Party grieved a Requiſite to conſtitute the Guilt of the Offender, lays down a Propoſition, which is not true. And this appears clearly by *Hawk. P. C. Lib.* 1. *c.* 72. *Pa.* 189, 190, and is confirmed by the Poulters Caſe in 9 *Co.* 56. And 9 *Rep.* 56. *b. Les Poulters* Caſe, mentions the Commiſſion; Which does not ſpeak of Conſpiracies *executed*, but only of "*Conſpiracies* in general.

2d Point. As to the 2d Objection—It is an Offence, undoubtedly, to conſpire to indict a Perſon, falſely and maliciouſly, of SOME Capital Crime, in *general*; And then ACCORDING *to* ſuch Conſpiracy, afterwards *actually* to indict him, falſely and maliciouſly, for a PARTICULAR Capital Crime.

The Indictment concludes "contra formam Statuti:" And therefore the Court may pronounce the Villainous Judgment, if they think proper.

Mr.

Mr. Serj. *Davy*, in Reply—There is a Diſtinction between a *Writ* of Conſpiracy, and an *Indictment* for a Conſpiracy. In an *Action*, the *Damage* is the Giſt of the Action; And therefore the Writ and Declaration muſt charge "That he "was indicted and *ſuſtained Damage:*" But that is not neceſſary, in an *Indictment*; which is for an Offence againſt the Public. And this Diſtinction explains Ld. *Coke*'s Meaning in 3 *Inſt.* 143.

Its being *after Verdict* or *before* Verdict, makes no Difference. *Hale's* 2 *H. P. C.* 193. is expreſs "That a defective "Indictment is *not aided by Verdict*. For an Indictment is "not within any of the Statutes of Jeofails: None of them "extend to an Indictment."

It is not denied "That this is an Indictment for a mere "*Conſpiracy* ONLY," and nothing more: And there is no Allegation of its being a *falſe* One.

Therefore the Indictment is bad: And no Judgment can be given upon it.

Lord MANSFIELD—We'll think of it. The Argument turns upon its being an Indictment for a *Conſpiracy only*.

Mr. Juſt. DENISON—In the Caſe of *Moor* v. *Kinnerſley*, It was holden "that an Indictment would lie for a "*Conſpiracy only*."

CURIA ADVISARE VULT.

N. B. The Defendants (who had been brought into Court by Virtue of the *Habeas Corpus,)* were now committed to the *Marſhal*, while the Court took Time to conſider.

* On *Wedneſday* 14th *May* 1760, * P. 999.

Lord MANSFIELD delivered the Opinion of the Court.

He ſtated the Caſe, and the Objections; (Which, He ſaid, had been very ingeniouſly argued:)

But, They All agreed that in Reality there was no Colour for them.

IF this had been a bare *unexecuted* Conſpiracy, which had *never taken Effect*, (as that in *Kinnerſley*'s Caſe was,) the Objections might have had *more* Weight: (though He gave *no Opinion*, He ſaid, *what Degree* of Weight they might have had even in *that* Caſe.)

But

But here is much *more* than a BARE *Conſpiracy without Effect*. Here is an *Overt Act* laid, as I may call it; And it is found "That the Defendants, ACCORDING TO *the Conſpira-* "*cy Combination and Agreement between them before had*, "actually DID, *falſely* wickedly and maliciouſly and with- "out any reaſonable or probable Cauſe, *indict* this Man;" And the *very Indictment itſelf* is particularly *ſpecified* in the preſent One.

So that *this* was a *complete* formed Conſpiracy, *actually* CARRIED *into Execution*.*

* The Fact was that though *Gilmore* was indeed diſcharged, *for want of Proſecution*; yet he had been actually *indicted*, and long kept in *Priſon* upon ſuch Indictment.

We are All very clear, that there is no Colour for the Objections, in the preſent Caſe; And that the Rule ought to be diſcharged.

Per Cur. The RULE to ſhew Cauſe Why the Judgment ſhould not be arreſted, was DISCHARGED. *V. Poſt.* 1027.

Rex *verſ.* Turkey-Company;
Or (rather now)
Rex *verſ.* March, Deputy Governor of the Turkey-Company (*V. ante* 943.)

Saturday 17th *May* 1760.

THIS Caſe, (purſuant to what had been before ſettled, came on in the *Crown-Paper*, upon the Return to a MANDAMUS which had iſſued ſince the † laſt Motion: Which *Mandamus* and Return were as follow—

† *V. ante* 943.

The Writ was directed to *John March* Deputy Governor of the Company of Merchants of *London* trading into the *Levant* Seas, commonly called the *Turkey* Company.

* P. 1000. * It recited that Whereas ſince the 24th Day of *June* 1754, that is to ſay, upon the 13th Day of *November* now laſt paſt, (and the Writ bore Teſte on the 12*th February*, 33 *G.* 2.) ISAAC ROGERS (being then a ſubject of this Realm of *Great Britain*, and alſo One of the People commonly called QUAKERS,) deſiring Admiſſion into the ſaid Company, did in due Manner make and ſubſcribe his *ſolemn Affirmation and Declaration* in that behalf requiſite, before *William Alexander* Eſq; and Sir *William Stephenſon* Knt. two of his Majeſty's Juſtices aſſigned to keep the Peace in and for the City of *London*, and alſo to hear and determine divers Felonies Treſpaſſes and other Miſdemeanours committed within the ſaid City; And Whereas the ſaid *Iſaac Rogers*, after the making the ſaid Affirmation and Declaration as aforeſaid, *offered Himſelf* and did make Requeſt to him the ſaid *John March*,

to

to be ADMITTED *into the ſaid Company*; and did then *tender to Him*, for ſuch his Admiſſion, for the Uſe of the ſaid Company, the Sum of 20*l.* and at the ſame Time did alſo produce to Him a *Certificate* under the Hands and Seals of the ſaid *William Alexander* and Sir *William Stephenſon*, the Juſtices aforeſaid, Certifying "that on the 13th Day of *Novem-*"*ber* in the Year of our Lord 1759, the abovenamed *Iſaac* "*Rogers, One of the People called* QUAKERS, appeared before "them (the ſaid Juſtices,) and had to Him adminiſtered, by "them, the above AFFIRMATION;" Yet he the ſaid *John March*, well knowing the Premiſſes, but not regarding his Duty in this Behalf, hath abſolutely *refuſed*, and yet doth *refuſe to admit*, the ſaid *Iſaac Rogers* into the ſaid Company; in Contempt &c. and to the great Damage and Grievance of the ſaid *Iſaac Rogers*, and in manifeſt Injury of his Eſtate &c: We therefore, being willing &c, Do Command &c, That immediately after the Receipt of this our Writ, You *admit* or cauſe to be admitted the ſaid *Iſaac Rogers* into the *ſaid Company* of Merchants trading into the *Levant* Seas, commonly called the *Turkey*-Company; or ſhew to Us Cauſe to the Contrary thereof; Leſt &c. And how &c. Witneſs &c.

The RETURN—The Anſwer of *John March*, Deputy Governor of the Company of Merchants of *England* trading into the *Levant* Seas, commonly called the *Turkey*-Company, to the within Writ.

I *John March*, Depu'y Governor of the Company of Merchants of *England* trading into the *Levant* Seas, commonly called The *Turkey*-Company, in the within Writ called "The "Deputy Governor of the Company of Merchants of *London* "trading into the *Levant* Seas, commonly called The *Tur-*"*key*-Company," (to whom the ſaid Writ hath been delivered,) Do moſt humbly Certify and Return to &c; That *long before *Iſaac Rogers*, in the ſaid within Writ named, offered himſelf to me to be admitted into the ſaid Company, to wit, in the 26th Year of His preſent Majeſty's Reign, *by a certain Act of Parliament*, made at a Seſſion of Parliament of our Lord the preſent King held at *Weſtminſter* in the County of *Middleſex* on the 11th Day of *January* in the Year of our Lord 1753, in the 26th Year of the Reign of his preſent Majeſty, intitled "An Act for enlarging and re-"gulating the Trade into the *Levant* Seas." It was and is (amongſt other Things) *enacted* "that from and after the 24th "Day of *June* 1754, a certain OATH (the Form of which "is ſet forth in the ſaid Act) in lieu of the *Oath* thentofore "taken by Perſons upon their Admiſſions to their Freedom "in the ſaid Company, *ſhould be taken by* EVERY *Perſon, upon* "*his Admiſſion to his Freedom*; either before the Governor or "Deputy Governor of the ſaid Company, or before two of

* Proof.

"His

" His Majeſty's Juſtices of the Peace (who were and are " thereby reſpectively impowered and required to adminiſter " the ſaid Oath :") Which Juſtices are thereby required to certify under their Hands and Seals, " That the ſaid OATH " *was taken before them.*"

And I further humbly certify and return to our ſaid preſent moſt ſerene Sovereign Lord the King, That the ſaid *Iſaac Rogers*, in the ſaid Writ named, hath NOT *taken*, but hath REFUSED *to take* the ſaid OATH by the ſaid laſt mentioned Act of Parliament required; either before the Governor or Deputy Governor of the ſaid Company, or before two of His Majeſty's Juſtices of the Peace: AND THEREFORE I cannot admit or cauſe to be admitted Him the ſaid *Iſaac Rogers* into the ſaid Company of Merchants trading into the *Levant* Seas, commonly called the *Turkey*-Company, as by the ſaid Writ I am commanded.

John March, Deputy Governor.

Mr. *Norton* argued, (on *Wedneſday* laſt) for the *Mandamus*.

The only Queſtion was, Whether a QUAKER, who has in due Manner, made and ſubſcribed his SOLEMN AFFIRMATION AND DECLARATION to the Effect of the Oath, can be admitted to the *Freedom of this Company* without actually taking the OATH appointed by the Act of 26 *G.* 2. *c.* 18. § 2. enabling every Subject of *Great Britain*, deſiring Admiſſion into that Company, to be admitted into it, upon paying or tendering 20*l.*

He argued that he *ought* to be admitted to this Freedom. The Act of 22 *G.* 2. *c.* 46. § 36 *(& penult.) pa.* 945. (for allowing Quakers to make Affirmation in Caſes where an Oath is or ſhall be required) extends to *all* Caſes of Oaths of *all* Kinds, required by *any* Act of Parliament to be taken * P. 1002. * by Quakers: And the three Exceptions in the ‡ Proviſo, excluding them from " being thereby qualified or permitted ‡ § *ult'.* " to give Evidence in any *Criminal* Caſes, or to ſerve on " *Juries*, or to bear any Office or Place of *Profit in the Go-* " *vernment*," ſtill more ſtrongly ſhew the Senſe of the Legiſlature. And this Caſe is *not* within *any* of theſe 3 Exceptions: It is only a Claim of an Admiſſion into a *trading* Corporation; not of any Emoluments from the public Offices of Government.

But this Queſtion has been already determined in the Caſe of *Rex* v. *Morris*, *P.* 10 *W.* 3. *B. R.* 1 *Ld. Raym.* 337. upon a *Mandamus* to admit *Morris* (who was a Quaker) to his Freedom of the City of *Lincoln*; He having ſerved an Apprenticeſhip there, for 7 Years. *Carthew* 448. S. C. *Rex* v. *Morrice*, *Mayor of Lincoln*, 5 *Mod.* 402. S. C. *Rex* v. *Mayor of Lincoln*——It was holden, " That the " Quaker *might* take the ſolemn Affirmation (by the Act " of

" of 7, 8 *W.* 3. *c.* 34.) *inſtead of the Oath*, And that ſuch " Freedom was *not* a Place of *Profit in the Government* " within the Meaning of the Exception in that Act."

Lord MANSFIELD—This Caſe explains the Proviſo in this Act of 22 *G.* 2. and the Declaration " That it " was made to explain a Doubt, Whether the Solemn " Affirmation preſcribed by 8 *G.* 1. could be allowed " and taken inſtead of an Oath, in any Caſe wherein " by any Act or Acts of Parliament an Oath is re- " quired; unleſs the ſaid Affirmation or Declaration " be by ſuch Act or Acts of Parliament *particularly* " *and expreſsly directed* to be allowed and taken inſtead " of ſuch Oath.

Mr. *Harvey*, for the *Turkey-Company*, argued (1ſt.) That this Caſe was *not* within the *Purview of the Act:* (2dly.) That if it is, yet it *is* within the *Meaning of the Exception.*

Firſt—The Act did not mean to give Quakers any Privilege of Affirming inſtead of Swearing, where they were not under ſome Penalty or Forfeiture, or had ſome antecedent Right veſted in them.

The Act of 13, 14 *C.* 2. *c.* 1. was *highly penal* upon Quakers. 1 *W.* & *M. c.* 18. §. 13. (the Act of Toleration) gave them *ſome* Indulgencies. 7, 8 *W.* 3. *c.* 34. *permits* the ſolemn Affirmation or Declaration, inſtead of an Oath, under the 3 Exceptions which have been mentioned. 8 *G.* 1. *c.* 6. (which is the Act recited in this Act of 22 *G.* 2. *c.* 4.) alters the *Form* of the ſolemn Affirmation or Declaration.

The *enacting* Part of the Act of 22 *G.* 2. *c.* 46. §. 36, 37. (a Hotchpot Act,) does indeed extend the ſolemn Affirmation or Declaration to *all* Caſes wherein, by any Act or * Acts of Parliament then in Force or thereafter to be * P. 1003. made, an Oath is allowed or required; although no particular or expreſs Proviſion be therein made for it. But this Act itſelf, in its *Purview*, is a good deal *confined*, and extends *only* to their *giving Teſtimony:* The Words are— " By reaſon of which Doubt, the *Teſtimony* of the ſaid " People called Quakers is frequently refuſed, whereby the " ſaid People, and Others requiring their Evidence, are " ſubjected to great Inconveniences; Therefore &c be it " enacted &c."

Secondly—They are *within the third Exception* contained in the Proviſo of this Act of 22 *G.* 2. §. 36. for it is a *Place* of *Profit.*

In the Caſe cited, it was an Office in a *Corporation*, *without* Profit.

This is not a Place *under* the Crown, or under the Government: But it is * IN the Government, (which is the Expreſſion uſed in the * Act;) as *Corporations for managing Trade*, are *Part* of the *Government*. And the very PRINCIPLES *of the Quakers* are *prejudicial* to trading Corporations carrying on great Trade in foreign Countries; as their Rights often require to be ſupported by *Force*, as well as (in the preſent Caſe) with Pomp and Shew (by their Ambaſſador at the Port.)

* *V.* §. 37.

This Caſe may be diſtinguiſhed from the cited Caſe of *Rex* v. *Morris*: For that was a Right to the Freedom of a *particular Place*, acquired by ſerving an Apprenticeſhip there; And it appears from 5 *Mod.* 403, that the Man had there an *antecedent veſted Right*; *viz.* by having ſerved ſuch Apprenticeſhip; Whereas here is *no* antecedent veſted Right; but only a *general* Claim, common to all other Subjects.

Mr. *Norton* in Reply—The Acts relating to Quakers do All of them give Privileges and Indulgencies to the Species of Diſſenters, called Quakers: So, particularly, it appears from the Preamble to 8 *G.* 2. *c.* 6. which ſpeaks of them with high Regard and Commendation.

The Caſe cited ſhews that there was a *Profit* to the Freeman; (*viz.* a Vote for Members of Parliament, and alſo Paſture in a Common;) And that they had a *Government* in their Corporation: Whereas this is a *mere trading Company*.

Here is juſt as much an *antecedent* Right, as there was in *that* Caſe. Our Claim is *founded* upon ſuch a Right.

Therefore He prayed a peremptory *Mandamus*, commanding the Company to admit him.

* P. 1004.

* Lord MANSFIELD ſaid He could not even ſtart a Doubt; the Point was ſo clear.

This can never be conſidered as a Place of Profit in the Government. And the Caſe cited is ſtronger than this: There was a Right to *vote in Elections to Parliament*, as well as a Right to have *Common of Paſture*.

However, As Mr. Juſt. DENISON choſe to read the Act of Parliament at more Leiſure, before He gave a poſitive and direct Opinion upon the Queſtion;

THE

THE COURT therefore took a few Days to conſider of it. And

Lord MANSFIELD now delivered the Reſolution of the Court.

He ſaid, It was not poſſible to find any Colour of Doubt. It was very clear, He ſaid, on the Act of * King *William*: And the Caſe of the Mayor of *Lincoln* is a Determination in Point. *V. 7, 8 W. 3. c. 34.

The Preamble of the 36th Section of 22 *G.* 2. *c.* 46. recites, as the Reaſon of the enacting Part, That a Doubt had ariſen "Whether the ſolemn *Affirmation* of Quakers, "preſcribed by 8 *G.* 1. could be allowed in any Caſe where "an Act of Parliament had required an OATH; Unleſs "the *Affirmation* be by ſuch Act *particularly and expreſsly* "directed to be allowed and taken inſtead of ſuch Oath:" "For removing which Doubt, it enacts that "in ALL ſuch "Caſes, upon Acts of Parliament then in Force, *or there-* "*after to be made*, which direct or require an Oath, it "*ſhall* be allowed, although *no* particular or expreſs Pro- "viſion be made for that Purpoſe in ſuch Act or Acts."

As to its being "an Office or Place of Profit *in the* "*Government*"—It is impoſſible to ſupport *that* Notion: For it can never be conſidered in *that* Light, moſt certainly. Even the *Remittances* of public Money for the *Uſe* and *Account* of the Government, if given by the Miniſtry to Quakers, may be very profitable Appointments to the Remitters: But yet, they are *no Places or Offices in the Government.*

This Man's Claim is nothing more than to be admitted into a Company of MERCHANTS trading to a particular Part of the World. And ſurely, there can be no Pretence to call THIS a *Place or Office of Profit in the Government.*

* Therefore this Return muſt be quaſhed; And there muſt be a peremptory *Mandamus.* * P. 1005.

RULE accordingly; *viz.* That the Return be quaſhed, for the Inſufficiency thereof; and that a PEREMPTORY MANDAMUS do iſſue.

Monday 19th *May* 1760.

Moſes *verſ.* Macferlan.

LORD MANSFIELD delivered the Reſolution of the Court in this Caſe, which ſtood for their Opinion, "Whether the Plaintiff could recover againſt the Defendant, in the *preſent Form of Action*, (an Action upon the Caſe for *Money had and received to the Plaintiff's Uſe*;) "Or whether He ſhould be obliged to bring a *Special* "*Action upon the Contract and Agreement* between them."

It was an Action upon the Caſe, brought in *this* Court, by the now Plaintiff, *Moſes*, againſt the now Defendant, *Macferlan*, (heretofore Plaintiff in the *Court of Conſcience*, againſt the ſame *Moſes* now Plaintiff here,) for *Money had and received to the Uſe of Moſes* the now Plaintiff in *this* Court.

The Caſe, as it came out upon Evidence and without Diſpute, at *Niſi Prius* before Lord *Mansfield* at *Guild-hall*, was as follows.

It was clearly proved, That the now Plaintiff, *Moſes*, had *indorſed* to the now Defendant *Macferlan*, four ſeveral Promiſſory Notes made to *Moſes* Himſelf by One *Chapman Jacob*, for 30*s.* each, for Value received, bearing Date 7th *November* 1758; And that this was done, *in order* to enable the now Defendant *Macferlan* to recover the Money in his *Own* Name, againſt *Chapman Jacob*. But previous to the now Plaintiff's indorſing theſe Notes, *Macferlan* aſſured Him "that ſuch his Indorſement ſhould be of no Prejudice to "Him:" And there was an AGREEMENT *ſigned by Macferlan*, whereby he (amongſt other Things) *expreſsly agreed* "That *Moſes* ſhould *not* be liable to the *Payment of the* "*Money* or any Part of it; and that He ſhould *not be pre-* "*judiced*, or be *put to any Coſts*, or *any way ſuffer*, by "reaſon of ſuch his Indorſement." NOTWITHSTANDING *which expreſs Condition and* AGREEMENT, and contrary thereto, the preſent Defendant *Macferlan ſummoned* the preſent Plaintiff *Moſes* into the *Court of Conſcience*, upon each of theſe 4 Notes, *as the Indorſer* thereof reſpectively, by 4 ſeparate Summonſes. Whereupon *Moſes*, (by One *Smith* who attended the Court of Conſcience at their ſecond Court, as Solicitor for him and on his behalf,) *tendered* * P. 1006. * the ſaid *Indemnity to the Court of Conſcience*, upon the firſt of the ſaid four Cauſes; and *offered to give Evidence of it and of the ſaid Agreement*, by Way of Defence for *Moſes* in that Court. But the Court of Conſcience *rejected* this Defence, and *refuſed* to receive any Evidence in Proof of this Agreement of *Indemnity*, thinking that they had no Power to judge of it; and gave Judgment againſt *Moſes*, upon the *mere foot of his Indorſement*, (which He himſelf did not at all diſpute,) without hearing his Witneſſes about the

the *Agreement* " that he ſhould not be liable:" For the Commiſſioners held this Agreement to be no ſufficient Bar to the Suit in *their* Court; and conſequently decreed for the Plaintiff in that Court, upon the undiſputed *Indorſement made by Moſes*. This Decree was *actually pronounced*, in only *One* of the 4 Cauſes there depending: But *Moſes*'s Agent, (finding the Opinion of the Commiſſioners to be as above mentioned,) paid the Money into that Court, upon *all* the four Notes; and it was *taken out of Court by the now Defendant Macferlan*, (the then Plaintiff, in that Court,) by Order of the Commiſſioners.

All this Matter appearing upon Evidence before Lord *Mansfield* at *Niſi Prius* at *Guildhall*, there was no Doubt but that, upon the *Merits*, the Plaintiff was intitled to the Money: And accordingly, a Verdict was there found for *Moſes*, the Plaintiff in this Court, for 6*l*. (the whole Sum paid into the Court of Conſcience:) but ſubject to the Opinion of the Court, upon this Queſtion, " Whether the " Money could be recovered in the PRESENT FORM *of* " *Action*, Or whether it muſt be recovered by an *Action* " *brought upon the* SPECIAL AGREEMENT *only*."

On *Saturday* the 26th of *April* laſt,—

Mr. *Morton*, on behalf of the Defendant *Macferlan*, moved to ſet aſide this Verdict found *for* the Plaintiff; and to have Leave to enter up Judgment *againſt* the Plaintiff, as for a Non-Suit.

And in order to ſhew that the Action was *not maintainable* in its *preſent Form*, He laid down a Poſition " That *In-* " *debitatus Aſſumpſit* will not lie, but where DEBT will lie." It lies not upon a *Wager*; nor upon a *mutual Aſſumpſit*: nor againſt the *Acceptor of a Bill of Exchange*; Neither will it lie for Money *won at Play*: For it will never lie, but where Debt will lie; And can never be, upon mutual Promiſes. 1 *Salk.* 23. *Hard*'s Caſe; and 6 *Mod.* 128. *Smith* v. *Aiery*, are expreſsly ſo, in Terms.

And, to maintain *Debt*, there muſt be either an *expreſs* Contract broken; or an *implied* Contract broken. But there is *no* Contract either expreſs or implied. " That *Moſes* " would have this Cauſe of Action againſt *Macferlan*:" *Chapman Jacob* was only to pay *Moſes* the Money *when* it * ſhould be recovered by *Macferlan*. An Indorſement of a Promiſſory Note is a juſt Cauſe of Action: And *Macferlan* recovered this Money, of *Moſes* the Indorſer, by Judgment of a Court of Juſtice. * P. 1007.

But *this* Action, " for Money had and received to his " Uſe," is not the proper Way of ſetting right the *Judgment of a Court of Juſtice*.

This

This *Agreement* could *not repel* the Action before the Court of Conſcience: It was only the Subject of an Action to be brought *upon itſelf*. This appears from the Caſe of *Beſton* v. *Robinſon*, in *Cro. Jac.* 218; Where *Beſton* was in Execution upon a Statute Merchant at the Suit of *Robinſon*; and brought an *Auditâ Querela*, and produced Articles between Him and *Robinſon*, as a *Diſcharge*: Which was holden *not* good, to diſcharge him of the Execution; But that his Remedy was to have an *Action of Covenant* upon them. So in 1 *Bulſtr.* 152. *Anon*; By *Williams* and the Reſt of the Judges, "If the Party be taken and impriſoned upon a "Judgment and Execution, where he has paid the Money, "He ſhall not have a *Superſedeas quia erronicè*, nor no Re- "medy, but only an *Auditâ Querela*: And upon *Promiſe of* "*Enlargement*, and not performing it, an Action on the "Caſe only lieth for this, and *no other* Remedy."

Mr. *Norton contra* for the Plaintiff.

We have *not* miſconceived our Action: We were *not confined* to bring an Action upon the Special Agreement; but were *at Liberty to bring this* Action, "for Money had and "received to our Uſe," to recover this Money *unfairly received* by the Defendant.

I do *not agree* to the Poſition, "That *Aſſumpſit* will *not* lie, *but where Debt* will lie."

**M.* 5 *G.* 2. *B. R.* (*V.* 2 *Strange* 915.) In the Caſe of *Aſtley* v. *Reynolds*, * This Principle was ſettled, *viz.* "That *wherever* a Perſon has *wrongfully paid* "*Money*, He may have it back again, by *this Action* for "Money had and received to his Uſe." And yet in that very Caſe, there *was another Remedy*. And there was the *Conſent* of the Payer too.

So likewiſe, for Money paid on a Contract which is never performed.

So, on a Wager (on a Horſe-Race,) againſt the Stakeholder, after the Thing is completed and over.

And no Inconvenience can ariſe: Every Thing is done and finiſhed, in the preſent Caſe; And no writ of Error lies to the Court of Conſcience; nor can its Judgments be over-haled.

* P. 1008. * The COURT, having heard the Counſel on both Sides, took Time to adviſe.

Lord MANSFIELD now delivered their unanimous Opinion, in *Favour* of the *preſent* Action.

There

There was no Doubt at the Trial, but that upon the *Merits* the Plaintiff was intitled to the Money: And the Jury accordingly found a Verdict for the 61. ſubject to the Opinion of the Court upon this Queſtion, "Whether the "Money might be recovered by *this* Form of Action," or "muſt be by an *Action upon the ſpecial Agreement only.*"

Many other Objections, beſides that which aroſe at the Trial, have *ſince* been made to the Propriety of this Action in the preſent Caſe.

The 1ſt Objection is, "That an Action of *Debt* would "not lie here; and no *Aſſumpſit* will lie, where an Action "of Debt may not be brought:" Some Sayings at *Niſi prius*, reported by Note-Takers who did not underſtand the Force of what was ſaid, are quoted in Support of that Propoſition. But there is *no Foundation* for it. 1ſt Objection.

It is much more plauſible to ſay, "That *where Debt lies*, "an Action *upon the Caſe* ought *not* to be brought." And that was the Point relied upon in * *Slade*'s Caſe: But the Rule then ſettled and followed ever ſince is, "That an "Action of *Aſſumpſit* WILL *lie* in many Caſes where *Debt* "*lies*, and in many where it does *not* lie." Anſwer. * 4 *Co.* 92.

A main Inducement, *originally*, for encouraging Actions of *Aſſumpſit* was, "*To take away the Wager of Law:*" And *that* might give Riſe to looſe Expreſſions, as if the Action was *confined* to Caſes only where that Reaſon held.

2d Objection.—That no *Aſſumpſit* lies, except upon an "*expreſs* or *implied* Contract: But here it is impoſſible to "preſume ANY *Contract* to *refund Money*, *which the Defendant recovered by an adverſe Suit.*"

Anſwer. IF the Defendant be under an *Obligation*, from the Ties of *natural Juſtice*, to *refund*; the LAW *implies* a *Debt*, and *gives this Action*, founded in the Equity of the Plaintiff's Caſe, *as if it were upon a Contract* ("*quaſi ex* "*contractu*," as the *Roman* Law expreſſes it.)

This Species of Aſſumpſit, ("for Money had and received "to the Plaintiff's Uſe,") lies in numberleſs Inſtances, for * Money the Defendant has received from a *third* Perſon; which he claims Title to, in Oppoſition to the Plaintiff's Right; and which he had, by Law, *Authority to receive* from ſuch third Perſon. * P. 1009.

3d Ob-

3d Objection. Where Money has been *recovered by the* JUDGMENT *of a Court having competent Juriſdiction*, the Matter can never be brought over again by a new Action.

Anſwer. It is moſt clear, "that the *Merits of a Judg-* "*ment* can *never be over-haled* by an *original* Suit, either at "Law or in Equity." Till the Judgment is ſet aſide, or reverſed, it is *concluſive*, as to the *ſubject Matter* of it, to *all Intents and Purpoſes*.

But the Ground of this Action is CONSISTENTLY with the Judgment of the Court of Conſcience: It *admits* the Commiſſioners did right. They decreed *upon the Indorſement of the Notes by the Plaintiff:* Which Indorſement is not now diſputed. The Ground upon which this Action proceeds, was no Defence againſt that Sentence.

It is enough for Us, that the Commiſſioners adjudged "They had *no Cogniſance* of ſuch *Collateral* Matter." We can not correct an Error in their Proceedings; and ought to ſuppoſe what is done by a final Juriſdiction, to be *right*. But We think, "the Commiſſioners *did right*, in *refuſing to go* "into ſuch *Collateral* Matter." Otherwiſe, by Way of Defence againſt a Promiſſory Note for 30*s*. they might go into Agreements and Tranſactions of a great Value: And if they decreed Payment of the Note, their Judgment might *indirectly* conclude the Balance of a large Account.

The Ground of this Action is not, "that the Judgment "was wrong;" but, "that, (for a Reaſon which the now "Plaintiff could not avail himſelf of *againſt* that Judgment,) "the Defendant ought not in Juſtice to KEEP the Money." And at *Guildhall*, I declared very particularly, "that the "Merits of a Queſtion, determined by the Commiſſioners, "where they had Juriſdiction, *never could be brought over* "*again*, in any Shape whatſoever."

Money may be recovered by a right and legal Judgment; and yet the Iniquity of *keeping* that Money may be manifeſt, upon Grounds which could not be uſed by Way of *Defence againſt the Judgment*.

Suppoſe an Indorſee of a Promiſſory Note, having *received Payment* from the *Drawer* (or *Maker*) of it, ſues and recovers the ſame Money from the *Indorſer* who knew nothing of ſuch Payment.

Suppoſe a Man recovers upon a Policy for a Ship *preſumed to be loſt*, which afterwards comes Home;—Or upon the
* P. 1010. * Life of a Man *preſumed to be dead*, who afterwards appears;—Or upon a Repreſentation of a Riſque *deemed to be fair*, which comes out afterwards to be groſsly fraudulent.

But

But there is no Occaſion to go further: For the Admiſſion " that, *unqueſtionably, an Action might be brought upon the* " *Agreement*," is a deciſive Anſwer to any Objection from the *Judgment*. For it is the *ſame* Thing, as to the Force and Validity of the Judgment, and it is juſt *equally* affected by the Action, Whether the Plaintiff brings it upon the *Equity* of his Caſe ariſing *out* of the Agreement, that the Defendant may refund the *Money* he received; Or, upon the *Agreement itſelf*, that, *beſides* refunding the Money, he may pay the *Coſts and Expences* the Plaintiff was put to.

This brings the Whole to the Queſtion ſaved at *Niſi prius*, *viz.* " Whether the Plaintiff may elect to ſue by this " Form of Action, for the *Money only*; or muſt be turned " round, to bring an Action upon the Agreement."

One great Benefit, which ariſes to Suitors from the Nature of *this* Action, is, that the *Plaintiff needs not ſtate the Special Circumſtances* from which he concludes " that, *ex* " *æquo & bono*, the Money received by the Defendant, " ought to be deemed as belonging to him:" He may *declare generally*, " that the Money was received to his Uſe;" and make out his Caſe, at the Trial.

This is equally beneficial to the *Defendant*. It is the moſt favourable Way in which he can be ſued: He can be liable no further than the Money he has received; and againſt *that*, may go into every equitable Defence, upon the General Iſſue; He may claim every equitable Allowance; He may prove a Releaſe without pleading it; In ſhort, He may defend himſelf by every Thing which ſhews that the Plaintiff, *ex æquo & bono*, is *not intitled* to the *Whole* of his Demand, or to any *Part* of it.

If the Plaintiff elects to proceed in this favourable Way, it is a *Bar* to his bringing another Action *upon the Agreement*; though he might recover *more* upon the Agreement, than he can by *this* Form of Action. And therefore, *if* the Queſtion was open to be argued upon Principles at large, there ſeems to be *no Reaſon or Utility* in confining the Plaintiff to an Action upon the ſpecial Agreement only.

But the Point has been long *ſettled*; and there have been many Precedents: I will mention to You One only; which was very ſolemnly conſidered. It was the Caſe of *Dutch* v. *Warren*, *M.* 7 *G.* 1. *C. B.* An Action upon the Caſe, for Money had and received to the Plaintiff's Uſe.

The

*P. 1011. * The Caſe was as follows—Upon the 18th of *Auguſt* 1720, on Payment of 262*l.* 10*s.* by the Plaintiff to the Defendant, the Defendant agreed to transfer him 5 Shares in the *Welſh* Copper Mines, at the Opening of the Books; And for Security of his ſo doing, gave him this Note—" 18th of " *Auguſt* 1720. I do hereby acknowledge to have received " of *Philip Dutch*, 262*l.* 10*s.* as a Conſideration for the " Purchaſe of 5 Shares; which I do hereby promiſe to " transfer to the ſaid *Philip Dutch* aſſoon as the Books are " open; being 5 Shares in the *Welſh* Copper Mines. Wit- " neſs my Hand *Robert Warren*." The Books were opened on the 22d of the ſaid Month of *Auguſt*; when *Dutch* requeſted *Warren* to transfer to him the ſaid 5 Shares; which he refuſed to do; and told the Plaintiff, " he might take " his Remedy." Whereupon the Plaintiff brought this Action, for the Conſideration Money paid by him. And an Objection was taken at the Trial, " that *this Action* upon " the Caſe, for Money had and received to the Plaintiff's " Uſe, would *not lie*; but that the Action ſhould have " been brought for the *Non-Performance of the Contract*." This Objection was over-ruled by the * Chief Juſtice; who notwithſtanding left it to the Conſideration of the Jury, Whether they would not make the Price of the ſaid Stock, as it was upon the 22d of *Auguſt*, when it ſhould have been delivered, the *Meaſure* of the *Damages:* Which they did; and gave the Plaintiff but 175*l.* Damages.

* Sir *Peter King* was then Ld. Ch. J. of *C. B.*

And a Caſe being made for the Opinion of the Court of Common Pleas, the Action was reſolved to be *well brought*; and that the *Recovery was right*, being not for the whole Money paid, but for the *Damages*, *in not transferring the Stock at the Time*; which was a Loſs to the Plaintiff, and an Advantage to the Defendant, who was a Receiver of the *Difference-Money*, to the PLAINTIFF's *Uſe*.

The COURT ſaid, that the *extending* thoſe Actions depends on the Notion of *Fraud*. If one Man takes another's Money to do a Thing, and refuſes to do it; It is a Fraud: And it is at the *Election* of the Party injured, either to affirm the Agreement, by bringing an Action for the Non-performance of it; or to diſaffirm the Agreement *ab initio*, by reaſon of the Fraud, and bring an Action for Money had and received to his Uſe.

The Damages recovered in that Caſe, ſhew the *Liberality* with which this kind of Action is conſidered: For though the Defendant received from the Plaintiff 262*l.* 10*s.* yet the *Difference-Money only*, of 175*l.* was *retained by him againſt Conſcience:* And therefore the Plaintiff, *ex æquo et bono*, ought to recover *no more*; agreeable to the Rule of the *Roman* Law—" *Quod conditio indebiti non datur ultra, quam* " *locupletior factus eſt, qui accepit.*"

* If the five Shares had been of *much more Value*, yet the * P. 1012. Plaintiff could only have recovered the 262*l.* 10*s.* by this Form of Action.

The Notion of Fraud holds much more ſtrongly in the *preſent* Caſe, than in *that:* For here it is *expreſs.* The Indorſement, which enabled the Defendant to recover, was got *by Fraud and Falſhood*, for *one* Purpoſe, and *abuſed* to *another.*

This kind of equitable Action, to recover back Money, which ought not in Juſtice to be kept, is *very beneficial*, and therefore *much encouraged.* It lies *only* for Money which, *ex æquo et bono*, the Defendant *ought* to refund: It does *not lie* for Money paid by the Plaintiff, which is claimed of Him as *payable in Point of Honour and Honeſty*, although it *could not have been recovered* from him by any Courſe of *Law*; as in Payment of a *Debt barred by the Statute of Limitations*, or *contracted during his Infancy*, or to the Extent of Principal and *legal* Intereſt upon an *Uſurious* Contract, or, for Money *fairly loſt at Play*; Becauſe in all theſe Caſes, the Defendant may *retain it with a ſafe Conſcience*, though by *poſitive* Law he was *barred* from recovering. But it *lies* for Money paid by *Miſtake*; or upon a Conſideration which happens to *fail*; or for Money got through *Impoſition*, (expreſs, or implied;) or *Extortion*; or *Oppreſſion*; or an *undue Advantage* taken of the Plaintiff's Situation, contrary to Laws made for the Protection of Perſons under thoſe Circumſtances.

In one Word, The Gift of this kind of Action is, that the Defendant, upon the Circumſtances of the Caſe, is *obliged by the Ties of natural Juſtice and Equity* to *refund* the Money.

Therefore We are All of Us of Opinion That the Plaintiff *might* ELECT *to wave* any Demand *upon the Foot of the Indemnity*, for the *Coſts* he had been put to; and *bring* THIS *Action*, to *recover the* 6*l.* which the Defendant *got and kept* from him *iniquitouſly.*

Rule—That the *Poſtea* be delivered to the Plaintiff.

The End of *Eaſter* Term 1760.

Trinity

* P. 1013.

* Trinity Term

33 & 34 Geo. 2. B. R. 1760.

Friday 6th June 1760.

Crawford *verſ.* Powell.

THIS was a Caſe reſerved at *Niſi prius* before Lord *Mansfield* at *Guildhall*, upon the Trial of an Action for a *falſe Return to a Mandamus*. The *Mandamus* was directed to *Griffith Powell*, commanding him to deliver to *Gibbs Crawford*, the Common Seal, Books, Papers and Records of the Corporation of *Harwich*; which the ſaid *Crawford* claimed to belong to his Cuſtody, as having been *duly elected* Town-Clerk of that Corporation; And his Election was ſet forth in the Writ. To this Writ of *Mandamus* (to deliver the *Inſignia &c, ut ſupra*) the Defendant *Griffith Powell* returned "That the ſaid *Gibbs Crawford* was NOT "DULY ELECTED Town-Clerk:" Upon which Return, alledged to be a falſe One, the preſent Action was brought.

The Declaration ſhewed That the Plaintiff *Crawford* was duly elected Town-Clerk *&c*, upon the 20th of *March* 1758; In virtue of which Election, it alledged, that the Common Seal, Books, Papers and Records belonged to Him *&c*: But that the Defendant *Powell* refuſed to deliver them to Him. The Declaration then ſhewed that the Plaintiff, upon ſuch his Refuſal, did, upon the 12th of *April* 1758, proſecute a Writ of *Mandamus returnable on Friday next after One Month from Eaſter* 1758, (being the ſame Writ upon which the Action is brought;) which was accordingly returned *upon the ſaid Return-Day*.

So that it appeared upon the Face of the Declaration, that this *Mandamus* was actually returned WITHIN SIX MONTHS after the Plaintiff's Election to the Office.

There was a Verdict for the Plaintiff; But it was objected on the Part of the Defendant, That the Plaintiff ought to

PROVE

* PROVE *his having taken the Sacrament* according to the Rites of the Church of *England within a Year next before his Election.* * P. 1014.

This Point was reſerved at the Trial, for the Opinion of the Court, and was twice argued; once, by Sir *Richard Lloyd*, on *Wedneſday 4th July* 1759; and a ſecond Time, by Mr. *Gould*, on *Friday 6th June* 1760; Both of them for the Defendant, in Support of the Objection.

They urged that it was incumbent upon the Plaintiff to *ſhew* that He was *duly* elected; And they contended that He could not have been duly elected, unleſs He had taken the Sacrament within a Year; For by the Statute of 13 *Car.* 2. *Stat.* 2. *c.* 1. "No Perſon *can be elected* into the Office of "Town-Clerk of a Corporation, that ſhall *not* have within "One Year next before ſuch Election taken the Sacrament "of the Lord's Supper according to the Rites of the Church "of *England*; And in Default thereof, Every ſuch Election "is thereby declared *void*." Conſequently, in order to make out his Title, He ought to prove his having taken the Sacrament within One Year next before his Election: And his not having done this, is without doubt a fatal Objection, upon *this* Statute of 13 *C.* 2. And it remains equally fatal, even *ſince* the Act for quieting and eſtabliſhing Corporations, 5 *G.* 1. *c.* 6. as the Return to this *Mandamus* was made WITHIN ſix Months after the Plaintiff's Election.

By this Act of 5 *G.* 1. *c.* 6. §. 3. "No Perſon thereafter "to be elected into ſuch Office ſhall be removed by the Cor-"poration or otherwiſe proſecuted for or by Reaſon of ſuch "Omiſſion; Nor ſhall any Incapacity Diſability Forfeiture "or Penalty be incurred by reaſon of the ſame; UNLESS "ſuch Perſon be *ſo removed*, or ſuch *Proſecution be com-"menced*, WITHIN *ſix Months* after ſuch Perſon's being "placed or elected into his reſpective Office *&c.*"

But this Act does not affect the *preſent* Caſe; where the Return was made within *two* Months after the Election of the Officer.

For although ſuch Incapacity and Diſability might be taken away by this Statute of 5 *G.* 1. in a Caſe where SIX *Months had elapſed* after the Election, without any Removal by the Corporation or Proſecution commenced and carried on with Delay; and conſequently, a Return of "*Non fuit* "*electus*," founded only upon this Incapacity and Diſability, but not made till AFTER *the Expiration* of the ſix Months, would indeed be a falſe Return, and the Plaintiff would have no Need (in *ſuch* a Caſe) to prove his having taken the Sacrament within a Year; Yet in the *preſent* Caſe, (where the Return is made *within* the ſix Months) it is not a falſe, but a *true* Return, if the Fact was "that He really had not "received

* P. 1015. " * received the Sacrament within a Year next before his " Election:" For as the Incapacity and Diſability incurred by the 13 *C.* 2. ſtands in this Caſe *unremoved* by the 5 *G.* 1. the Plaintiff *remains ſtill open and liable* to a Removal by the Corporation, or to a Proſecution to be commenced within the ſix Months. So that there is a vaſt Difference between a Return of this kind made *within* the ſix Months (as this is,) and a Return made AFTER THE EXPIRATION of the ſix Months: The former, if ſupported by the Fact, is a *true* Return; the latter, a *falſe* One.

In the *preſent* Caſe, therefore, As this Statute of 5 *G.* 1. *c.* 6. had *never taken Place*, it was incumbent upon the Plaintiff to *prove* " that He had taken the Sacrament within " the Year next before his Election;" as his Election would otherwiſe be *void*, by 13 *C.* 2.

In the Caſe of *Tufton Eſq*; v. *Nevinſon, Mayor of Appleby*, 2 *Ld. Raym.* 1354. (which was in *Eaſter* Term 10 *G.* 1.) upon an Iſſue taken on a " *Non fuit Electus*" returned by the Mayor to a *Mandamus* commanding Him to ſwear the Plaintiff Mr. *Tufton* into the Office of an Alderman of that Burrough, being (as the Writ ſuggeſted) duly choſen, Mr. Serj. *Pengelly*, who was for the Defendant, made this very Objection, " that Mr. *Tufton* ought to prove that He had " received the Sacrament within a Year before his Election;" (though ſix Months were, in that Caſe, elapſed ſince his Election.) And the whole Court were unanimous in Opinion, Firſt, that the Caſe was not within the 5 *G.* 1. *c.* 6. becauſe the Plaintiff *Tufton never was admitted* into the Office, and therefore could not be *removed out of it* nor *incur a Forfeiture*; Secondly, that it *was incumbent on the Plaintiff* to prove " that He had received the Sacrament &c with- " in a Year before his Election, by 13 *C.* 2. *c.* 1. Elſe his " Election was *void*:" And ſo it was ſaid to have been ruled in other Caſes there mentioned.

Marten v. *Jenkin*, *M.* 14 *G.* 2. *B. R.* mentioned in 2 *Strange* 1145. was a *Mandamus* directed to *Jenkin* the late Mayor of *Winchelſea*, commanding him to ſwear *Marten* into that Office: Who returned " *Non fuit electus*;" and an Iſſue was joined thereon. A Special Verdict found, that the Mayor was to be choſen out of the Jurats; and that the Plaintiff *Marten* was on 1ſt *May* 1739, choſen a Jurat and ſworn in, and continued ſo till 7th *April* 1740, when He was choſen Mayor; and that He had received the Sacrament within a Year before his Election to be Mayor, but had *not* done ſo within a Year next before his Election to be a *Jurat*. The Court held the Statute of 5 *G.* 1. *c.* 6. §. 3. to operate ſo as to give Him the Benefit of Non-Proſecution within ſix Months, with regard to the previous Qualification, and re-

move

* move his Incapacity and Diſability ariſing from ſuch Neglect: And they held the Verdict to be ſufficient for them to give Judgment upon, although it was not found negatively, "that there was *no* Proſecution within the ſix Months;" as his Election did appear, and nothing appeared to avoid it, (which ſhould have come on the *other* Side.) And they gave Judgment for the Plaintiff. * P. 1016

In the latter of theſe Caſes, the Officer was *ſettled* in his Office, by the ſix Months being expired without Proſecution. Here, the Plaintiff Mr. *Crawford* was *not* ſo: His Incapacity and Diſability, if ever it exiſted at all, muſt *remain* the ſame, *till after* the Expiration of the 6 Months.

Therefore the Action for a falſe Return can't be maintained in the preſent Caſe, without the Proof inſiſted upon: Nor ought the Defendant *Powell*, who was the preceding Officer, to have delivered over the Books and Inſignia of the Corporation, to a Man at that Time liable to Removal or Proſecution for not having taken the Sacrament within the Year next before his Election.

But the COURT (notwithſtanding all this plauſible Reaſoning) over-ruled the Objection, and gave Judgment for the Plaintiff.

Lord MANSFIELD ſaid that *ſince* the Statute of 5 *G.* 1. *c.* 6. * the Election of a Perſon who had not taken the Sacrament within a Year next preceding it, is *not* VOID, but *only* VOIDABLE *in Caſe of a Removal or Proſecution within the Time thereby limited:* And conſequently, as here was no ſuch Removal or Proſecution within that limited Time, the Plaintiff's Election ſtood *confirmed* and became *abſolute*. He therefore thought this a clear Caſe; and that there was no real Force in the Objection. He did not think it like to the Caſe of *Tufton* v. *Nevinſon* that had been cited from *Ld. Raymond's Reports:* Becauſe that aroſe upon the Officer's bringing a *Mandamus* to ſwear Him *into his Office*, being then *out of Poſſeſſion*; whereas this Plaintiff is *in Poſſeſſion* of the *Office*, and only brings his *Mandamus* for the *Inſignia* and other Things belonging to it. * *Vid.* §. 5.

Per Cur. JUDGMENT for the PLAINTIFF.

Oldknow

* P. 1017.

* Oldknow *verſ.* Wainwright; or Rex *verſ.* Foxcroft.

Tueſday 10th June 1760.

Tr. 31 *G.* 2. *Rot'lo* 159.

THIS Caſe of *Oldknow* v. *Wainwright* was a feigned Action, under a Rule by Conſent, to try a RIGHT OF ELECTION to the Office of Town-Clerk of *Nottingham:* Which Rule was made in the other Cauſe of *Rex* v. *Foxcroft*, againſt whom an Information had been prayed by *Seagrave* his Competitor.

The *Conſent-Rule* was to the Effect following—" *Rex* v. " *Foxcroft &c.*" The firſt Part of the Conſent is, " That " the *Matters in Difference between the Parties* ſhall be tried " in a feigned Action:" Then the Rule goes on, " That " *Oldknow* ſhould be Plaintiff, and *Wainwright* Defendant;" And particularly ſpecifies and ſettles the ſeveral Iſſues that were to be tried. Then comes a Clauſe of Conſent " That " the Judge who ſhould try the Cauſe ſhould be at Liberty " to indorſe any Special Matter that might ariſe at the Trial, " upon the *Poſtea.*" Then it concludes thus—" And by " the like Conſent, it is laſtly Ordered That THE COSTS " ſhall abide the Event of the Iſſue."

There were 4 Iſſues to be tried: 1ſt. " Whether the " Mayor alone had a Right to appoint the Town-Clerk." And it was found " That He had *not.*" 2d Iſſue—*Suppoſing* He had, then " Whether *J. Foxcroft* was duly appointed by " Him." On this Iſſue, a Verdict was given " *Againſt* the " Mayor's Appointment." 3d Iſſue—" Whether the Mayor " Aldermen and Common Council have the ſaid Right of " Election." This was found in the *Affirmative.* (So that theſe 3 Iſſues were All found for the Defendant.) 4th Iſſue —Suppoſing the Mayor Aldermen and Common Council *have* the Right, then " Whether *Thomas Seagrave* was DULY " *elected* by them." As to this 4th Iſſue, there was a Special Verdict to the following Effect. It ſets out the Conſtitution of the Burrough, and that the Voices were All equal Votes. Then it ſets out the Vacancy of the Office of Town-Clerk, and a regular Summons to elect Another. That the whole Number of Electors was Twenty-five; and that out of that Number, Twenty-one aſſembled on the 26th of *May*, purſuant to the ſaid Summons. That the Mayor put *Thomas Seagrave* in Nomination; And that No *other* Perſon was put in Nomination: That Nine of the Twenty-one voted for him.

* him: But Twelve of them did *not vote at all*, but Eleven of them PROTESTED againſt *any* Election *at that Time*; becauſe the Office was already full (as they alledged) of *Foxcroft*, whoſe Right was then under Litigation in this Court. That there was a *written Proteſt* againſt any Election at all, either of *Seagrave*, or any other Perſon, by Four Aldermen and Six Common-Council Men; becauſe a Suit was then depending in the Court of King's Bench concerning the Right of *Foxcroft*. Theſe Ten ſigned the written Proteſt: Another *(Hollins)* did not ſign, nor vote; but declared "that He "*ſuſpended doing any Thing*." * P. 1018.

However, at the ſame Court or Aſſembly, the Mayor declared the ſaid *Thomas Seagrave* duly elected: And he took the Oaths of Office, and the other requiſite Oaths, in due Manner and Form.

The Queſtion now before the Court was Whether the ſaid *Thomas Seagrave* was DULY ELECTED into the Office of Town-Clerk.

Mr. *Caldecott*, on Behalf of the Plaintiff, argued (on *Tueſday* 6th of *May* laſt) That *Seagrave* was *not* duly elected. For Twenty-five had a Right of voting; All had equal Voices; And of Twenty-one that met, Eleven PROTESTED *againſt* ANY *Election at that Time*: Therefore, theſe Eleven were all *negative* Voices, and AGAINST *Seagrave*; And *only Nine* were *for* him.

Beſides, this was NO *Corporate* Act.

All the Twenty-five were ſummoned; And 21 appeared: The Voice of the Majority of theſe who were *preſent*, was the Voice of the *Whole* 25; And Mr. *Seagrave* had *not* a Majority of them.

Therefore the Iſſue is found for the Plaintiff: And We pray that the *Poſtea* may be delivered to him.

Mr. Serj. *Hewitt contra*, for the Defendant.

The ſubſtantial Matter in Queſtion was "Whether the "*Right* of *appointing* the Town-Clerk was in the *Mayor*; or "in the *Mayor, Aldermen and Common Council*." The Mayor Aldermen and Common-Council-men make the 25, who are the Corporate Body.

Here was a regular Summons of the whole Body; and a Corporate Meeting of 21 of them, for the Buſineſs of this Election; And they *entered upon* the Election: Therefore they could *not deſert* it unfiniſhed.

At this Meeting, the Mayor *nominated Mr. Seagrave*; Which *No One then oppoſed*: A Vote was taken; And Nine

* P. 1019. * voted *for* Mr. *Seagrave*. After which, Ten, or (as it is ſaid) Eleven *proteſted againſt* any Election at all, at that Time. But mere *Silence* is *not* a Negative, either expreſſed or implied: And as *No other* Perſon was propoſed, And Nine voted for him, and *None againſt* him, He was well elected.

The Proteſters *then* thought the Office was full already, of *Foxcroft*: But it *now* is found "That *Foxcroft* was *not* duly "elected." They thought that the Office being full (as they apprehended) of *Foxcroft*, precluded them from electing another Perſon. But if *Foxcroft*'s Nomination and Appointment were bad, they *were* at Liberty to elect another Perſon. The Caſe of *Aberyſtwith*, in 2 *Strange* 1157, and alſo that of *Tintagel* there cited, ſhew That the Proteſters proceeded upon a Miſtake, in fancying they could not elect Another, whilſt a former claimed upon a controverted Title.

Though the *Preſence* of a Majority of the whole Number be neceſſary, yet the Concurrence and *Conſent* of a *Majority of the whole Number* is *not* neceſſary: A Majority of the Number preſent is ſufficient. This appears from the Caſe of Sir *Robert Saliſbury Cotton* v. *Davies*, 1 *Strange* 53.

If theſe Proteſters had *gone away*, and left the Aſſembly, it had made no Difference after the Buſineſs was *once begun*. In ſuch Caſe, the Reſt had a Right to *proceed*. *M.* 4 *G.* 2. *Rex* v. *Norris*, *B. R.* 1 *Barnardiſton*, 385, 386.

It does not appear that theſe Proteſters would *not* have voted for Mr. *Seagrave*, *if* they had voted *at all*. And, at this very Aſſembly, He was declared by the Mayor to be duly elected; and was accordingly ſworn in, in the Preſence of the Proteſters.

This is clearly a Corporate Act.

Mr. *Caldecott*, in Reply.

Though there *was* a Queſtion, "*In whom* the Right of "Appointment or *Election* lay;" Yet this Right of the Perſon *elected* was *alſo* in Queſtion.

Mr. *Foxcroft* had a Prior Nomination or Election, by the Mayor: And the Proteſters thought, that whilſt his Right was *ſub lite*, they ought not to go on at all to the Election of another Perſon. Eleven of them formally proteſted againſt it; Which certainly is Voting *againſt Seagrave*'s Election.

The

* The Caſe of *Aberyſtwith*, in 2 *Strange* 1157. is certainly true—"That where there is a *void* Election, the "Court will grant a *Mandamus* to go to an Election." But that is nothing to *this Caſe*. * P. 1020.

In the Caſe of *Rex* v. *Norris*, The preſence of the Mayor was neceſſary.

Lord MANSFIELD ſaw no Doubt in this Caſe. Here was an Aſſembly *duly ſummoned*; One Candidate was named; *No other* was named; The *Poll* was *taken*; They had *no Right to ſtop*, in the Middle of the Election; The Mayor did not put any Queſtion for Adjournment; nor was there any.

But, Mr. *Caldecott* prayed another Argument; Becauſe Mr. Serj. *Poole* was retained to argue it on the ſame Side with Him, for the Plaintiff.

Whereupon, the Court gave Leave that it ſhould be argued again; and ordered an

ULTERIUS CONCILIUM.

On *Tueſday* 10th *June* 1760, This Cauſe ſtood in the Paper for further Argument. But

Mr. Serj. *Poole*, for the Plaintiff, ſaid He but very lately received his Inſtructions; and therefore prayed further Time.

But the COURT refuſed to grant it; Becauſe it was his own Client's Fault, not to have inſtructed him ſooner; as the further Argument was indulged to the Plaintiff, at his own Deſire, in the laſt Term. However, They offered and even deſired to hear what Mr. Serj. *Poole* might *now* have to ſay: For that they were quite open to Conviction.

But the Serjeant not urging any Thing further—

Lord MANSFIELD confirmed his former Opinion.

He ſaid, The proteſting Electors had no Way to ſtop the Election, when once entered upon, but by voting for *ſome other* Perſon than *Seagrave*, or at leaſt againſt Him: Whereas here they had *only proteſted* againſt any Election at that Time.

Mr. Juſt. WILMOT—There was a Caſe of *Rex* v. *Withers*, *Paſch.* 8 *G.* 2. *B. R*; Where out of Eleven Voters, Five voted, and Six * refuſed: And the Court there held, * It was an Election of a Burgeſs of *Weſtbury*, upon a ſingle Vacancy. Six voted for *Withers* ſingly: Six others voted for *two* Perſons *jointly*, (tho' it was upon a ſingle Vacancy.) The Court held clearly, "that the double Votes were abſolutely thrown away;" and refuſed to grant an Information againſt *Withers*.

* P. 1021. " * That the Six *virtually conſented.*"

In the Caſe of *Regina* v. *Boſcawen*, *P.* 13 *Ann. B. R.* (in *Truro,)* where Ten voted for *Roberts*; and Ten for *Boſcawen*, a Non-Inhabitant: The Votes given for a Non-Inhabitant, where Inhabitancy was neceſſary, were holden to be *thrown away*. So, in the Caſe of *Taylor* v. *Mayor of Bath* * *Temp.* Ld. Ch. J. *Lee*, *B. R.*

* *M.* 15 *G.* 2. 21ſt *November* 1741.—It was holden " that Votes given for an unqualified Perſon, under Notice of his Incapacity, are thrown away."

Lord MANSFIELD—Whenever Electors are preſent, and don't vote at all, (as they have done here,) " They virtually acquieſce in the Election made by Thoſe who *do*.

Therefore, *Per Cur.*

JUDGMENT for the DEFENDANT,
(on this * 4th Iſſue, upon the Special Verdict.)

* Note—The 3 Other Iſſues had been *found* for the Defendant, as is above mentioned.

Afterwards, on *Wedneſday* 25th of *June*, this Caſe then b aring the latter Name, *viz. Rex* v. *Foxcroft*.—Mr. *Caldecott*, on Behalf of the Defendant therein, ſhewed Cauſe Why the ſaid Defendant *Foxcroft* ſhould not pay to the Proſecutor in this Cauſe, his COSTS as well in *this* Cauſe of *Rex* v. *Foxcroft*, as in the *Information* in the Nature of a *Quo Warranto againſt Robert Seagrave*; and *likewiſe* the Coſts in the *Mandamus* moved for againſt *Cornelius Huthwaite* Eſq; late Mayor of *Nottingham*.

He urged that No OTHER *Coſts* were payable but thoſe that aroſe upon the CIVIL Action, *viz.* the *feigned Iſſue* which had been tried by Conſent of the Parties, in order to determine the Right; and which feigned Iſſue had been found in Favour of *Seagrave*, and againſt *Foxcroft*.

† *Rex* v. *Nichols & al'* 12 *June* 1755.

And for this, He relied upon the Authority of the Caſe of the † Burrough of *Walſall*, (in the Diſpute between the Burrough and the Foreign of that Place,) *Tr.* 28 *G.* 2. *B. R.* as a Reſolution directly in Point: Where it was determined " That *no* Coſts were payable upon theſe feigned Iſſues; " but the Coſts in the CIVIL *Suit* ONLY."‖

‖ And ſo it was alſo determined in *Rex* v. *Griffiths*, *M.* 29 *G.* 2. *B. R.* and in *Thomas* v. *Powell*, *P.* 31 *G.* 2. *B. R.*

Mr. *Norton*, *contra*, on Behalf of Mr. *Seagrave* the Proſecutor, inſiſted upon Coſts of the WHOLE; *viz.* the Coſts in *this* Cauſe of *Rex* v. *Foxcroft*, the Coſts in the *Information againſt Seagrave*, and the Coſts of the *Mandamus directed to Huthwaite*, as well as the Coſts of the Civil Suit upon the feigned Iſſue.

Lord

* Lord MANSFIELD was of Opinion That the Court were *tied down* by the * *Conſent Rule*, to direct the Coſts of the WHOLE to be paid by the Defendant *Foxcroft*. It was made in the Cauſe where an Information was prayed againſt him, in the Nature of a *Quo Warranto*, to ſhew by what Authority He claimed to be Town-Clerk of *Nottingham*; to which Office *Seagrave* alſo claimed a Right. *Foxcroft* thereupon conſents "That the Matters in "difference between the Parties ſhall be tried in a feigned "Action;" And then he conſents, in expreſs Terms, "That "THE *Coſts* ſhall abide the Event of the Iſſue:" Which muſt mean the *Whole* Coſts; or elſe it has no Meaning at all; For the Coſts on the CIVIL Side (ariſing upon the feigned *Iſſue only*) would *of Courſe* abide its Event, *without needing* any Rule or any Conſent for *that* Purpoſe; (that Point having been fully ſettled long before the Making of the preſent Conſent-Rule.) Conſequently, this Conſent takes in the OTHER Coſts, on the *Crown*-Side. * P. 1022. * *V.* the Conſent-Rule before *pa.* 1017.

The Other Three JUDGES were of the ſame Opinion.

RULE made ABSOLUTE.

Trapaud *verſ.* Mercer.

Hil. 32 *G.* 2. *Rot'lo* 984.

THIS was a Cauſe in the Paper, upon a Demurrer: And the whole Queſtion turned upon the *Pleadings*. The Replication concluded to the *Country*: And the Defendant inſiſted that it ought to have concluded with an *Averment*.

The PRINCIPLE was agreed, by both Bar and Bench "That where there was an Affirmative and a Negative, "the Concluſion ought to be to the Country;" But the preſent Demurrer was grounded upon a Suppoſition "that "as theſe Pleadings ſtood, here was *not* an Affirmative and "a Negative."

The Pleadings were as follow—

It was an Action of Debt on Bond. On Oyer, It appeared to be conditioned thus—The Condition firſt recited that One *Robert Grier* had been appointed by the Plaintiff, who was Lieutenant-Colonel of the 2d Battalion of the Buffs, and by Mr. *Hughes*, the Major, to be Pay-maſter of the ſaid Battalion; and then went on, That if the ſaid *Grier* ſhould within 30 Days after *any* Demand in Writing, render an Account of All Monies received by him &c; And

* P. 1023. * And in caſe there ſhould be any Deficiency &c. then if the Defendant ſhould make good any ſuch Deficiency, not exceeding 1000*l*; the Obligation to be void. And the Plaintiff aſſigned the Breach, in *Grier*'s not rendering an Account within 30 Days after a Demand in writing.

The Defendant (who ſtood thus bound as Security for *Grier*) pleaded (by Leave of the Court) two ſeveral Pleas; *viz.* 1ſt. That no Demand in Writing was made &c; 2dly. (Proteſting that no Demand &c was made,) He for Plea ſays that *Grier* DID *render an Account* within 30 Days after *any* Demand in Writing, and paid the Monies due &c; and that no Deficiency at all was made to appear.

To this 2d Plea, (which 2d Plea alone was now before the Court,) the Plaintiff replied "That a large Sum of "Money, that is to ſay, the Sum of 2000*l*. was received "by *Grier* &c; and that, *on ſuch a Day* (particularizing "it) a DEMAND *in Writing was made* &c; And yet *no* "*Account* was rendered by *Grier*, within 30 Days &c:" Which Replication *concluded* to the COUNTRY.

To this Replication, The Defendant demurred: And

Mr. *Yates*, for the Defendant, argued in Support of the Demurrer, That the Replication *ought* to have concluded with an AVERMENT: For that this was not a proper Affirmative and Negative, but a *Matter newly alledged* in the Replication; which *newly-alledged Matter* the Defendant ought to have an Opportunity of *Anſwering*. And as the Plea is *general*, it was neceſſary for the Plaintiff to aſſign a particular Breach, in his Replication.

Mr. Serj. *Hewitt*, for the Plaintiff, urged that it was NOT *new Matter*, but a *proper* Negation of the Matter pleaded, and made a *ſufficient Affirmative and Negative*; and therefore the Concluſion was as it ought to be. And

THE COURT were of this Opinion.

Lord MANSFIELD—The material Queſtion between the Parties is—"Whether an Account has been *demanded* in "Writing; ſuch an Account *rendered* within due Time; "And the *Money paid*." The Sum of the Defence is, "That NO DEMAND was made: But *ſuppoſing* that a "*Demand* WAS *made*, yet an Account was RENDERED "within due Time after EVERY ſuch Demand; and the "*Money paid*." The Replication alledges "that an Ac-"count *was demanded* in Writing, *on ſuch a particular Day*; "but that *Robert Grier* DID NOT, then or at any Time "after, *render an Account*." This is undoubtedly, a *proper* FACT *to be tried*.

Mr.

* Mr. Juſtice DENISON concurred that it was; and that this was a proper Affirmative and Negative. * P. 1024.

The Plea, "that *Grier did* render an Account within 30 "Days after ANY Demand &c," muſt be underſtood as if it had been worded "after EVERY Demand;" and imports that He had done it after EVERY Demand. To which, the Plaintiff replies, "That a *Demand was made upon* "*ſuch a particular Day*; yet *Grier* did *not* render an Account "within 30 Days after it." It is objected "That as the "Plea is *general*, the Replication ought to *aſſign a particu-* "*lar Breach*."

And it is ſo, in *ſome* Caſes; as, for Inſtance, in a Plea of a *general Performance of Covenants*: But it is *not* ſo, in the *preſent* Caſe. For the Queſtion here is *not* "Whether "*Grier* rendered an Account;" but "Whether a DEMAND "*was made upon Grier*, ſo as to *intitle* the Plaintiff to an "Account." It is as much an Affirmative and a Negative (to my Apprehenſion,) as if the Defendant had pleaded "That after Demand made upon ſuch a Day, He *had ren-* "*dered* an Account:" To which, the Plaintiff had replied, "That he had *not*."

Mr. Juſt. FOSTER alſo thought that the Whole Merits might have been tried upon this Iſſue, "Whether there was "a *Demand*, or not."

Mr. Juſt. WILMOT concurred, that the Replication does here meet the Plea; and is properly concluded to the Country. For the Plea ſays, "You made no Demand: But if "you did, He rendered an Account." The Replication ſays, "I *made* a Demand, on ſuch a Day; Yet He ren- "dered *no* Account." Which is a ſufficient Affirmative and Negative.

Per Cur. unanimouſly,
JUDGMENT for the PLAINTIFF.

Nedriffe *verſ.* Hogan.

THIS was an Action on ſeveral Promiſes; *viz. Indebitatus Aſſumpſit* for 40*l.* lent, 40*l.* had and received to the Plaintiff's Uſe, and 40*l.* laid out and expended for the Plaintiff's Uſe.

The Defendant (having had Leave to do ſo) pleaded ſeveral Pleas; One of which was a Plea of a Sett-off; namely,

of

* P. 1025. * of a PENALTY of 200*l.* incurred by the Non-Performance of certain *Articles of Agreement*, relating to the Sale of a Ship.

The Plaintiff demurred, for Cauſe: And One of the Cauſes ſpecified, was "that the PENALTY of Articles "of Agreement (which ſounds in *Damages* only, and is *not* "a liquidated certain Debt or Demand) CAN NOT *be* SET "OFF."

To this, there was a Joinder in Demurrer.

Mr. *Walker*, for the Plaintiff.—This Sett-off is not within the Act of 2 *G. c.* 22. § 13. For *no* PENALTY *at all* can be ſet off, under *that* Act. Whereas this is not the Penalty of even a Bond conditioned for Payment of Money only, but a *Penalty of a Bond conditioned for Performance of Articles:* Which Penalty *ſounds in Damages:* And *Damages* cannot be ſet off. It ought to be a *certain* Demand: A Penalty founded in Damages was never meant or intended by this Act of Parliament.

* *V. ante*, *pa.* 822 to 826. where theſe two Acts are diſcuſſed and explained.

But the * ſecond Act of 8 *G.* 2. *c.* 24. § 5. is clearer ſtill: For this § 5. fixes it to the Sum *truly and juſtly due*; even on Bonds conditioned for Payment of *Money* only. Which fully proves "that the *Penalty* of ſuch a Bond as *this* is, can "not be ſet off."

A Second Objection (which was alſo the 2d Cauſe of Demurrer,) was mentioned: But no further Notice was taken of it, either by Court or Counſel.

Mr. *Field*, for the Defendant.—The former Act is *general*, "that mutual Debts may be ſet One againſt the Other." Upon which, There was a Doubt, and a Difference of Opinion between this Court and the Court of Common Pleas, concerning Setting-off Debts of different Natures. The 8 *G.* 2. *c.* 24. § 5. allows it, notwithſtanding the Debts are deemed in Law to be of a different Nature. And the Purpoſe of 8 *G.* 2. was to extend, and not to reſtrain the former Act. Indeed it reſtrains the Caſe of a Debt accruing by reaſon of a Penalty *ſo far, (but no farther,)* "that it ſhall "be † PLEADED."

† But this Clauſe (§ 5) adds, "that in ſuch a Plea ſhall be ſhewn how much is *truly and juſtly due* on either Side;" and that Judgment ſhall be entered for no more than what ſhall appear to be truly and juſtly due.

Lord MANSFIELD ſtopt Mr. *Field*; and declared it to be, moſt clearly, a Caſe *not* within theſe Acts; as it was for the WHOLE *Penalty*.

He ſaid, He expected that it would have been put upon the Foot of Setting-off the Sum that the Defendant *imagined*

to

* *to be* REALLY *due* for the *Damages ſuſtained*: But He now perceived that it was inſiſted that the WHOLE PENALTY might be ſet off. He ſaid, It is clearly moſt *unjuſt*, and contrary to the *Intention* of the Acts of Parliament, "That "the WHOLE *Penalty* ſhould be admitted to be pleaded by "Way of Sett-off, when perhaps a very ſmall Sum was "really due for ſuch Damages as the Defendant had actually "ſuſtained." * P. 1026.

Therefore the COURT, without further Argument, gave JUDGMENT for the PLAINTIFF.

Maxwell *verſ.* Mayer Eſq;

MR. *Norton*, on Behalf of the Defendant, moved to ſtay the Plaintiff's Proceeding, until *Security* ſhould be given for *anſwering the* COSTS of this Suit, in Caſe it ſhould go againſt him.

It was an Action againſt the Defendant as a Juſtice of Peace, for illegally convicting the Plaintiff upon the Acts of Parliament relating to Hawkers and Pedlars; Which Acts give Coſts to Magiſtrates, upon Actions brought againſt them for acting in Purſuance thereto, to be paid by Perſons who fail in ſuch Actions.

He moved this, upon an Affidavit "That the Plaintiff "was a *Scotchman reſident in Scotland:*" Whom the Proceſs of this Court could not therefore reach, in Caſe he ſhould fail in his Action.

But the COURT anſwered, that it was, at the *utmoſt*, no more than the Caſe of a FOREIGNER who brings an Action here: In which Caſe, the Court will never oblige him to give Security for the Coſts.

And Mr. *Norton* acknowledged that He did not expect to prevail in his Motion: and had told his Client ſo.

Per Cur.
Take Nothing by your Motion.

* Rex *verſ.* John Spragg and Mary Elizabetha Spragg (his Daughter.)

*P. 1027. *Wedneſday* 11th *June* 1760. *V. ante* 930, and 993.

MR. Juſtice FOSTER (in the Abſence of Mr. Juſt. DENISON) pronounced the * Sentence upon the Defendants: Whoſe Offence (of *maliciouſly conſpiring to indict* and actually *falſely indicting* a Perſon of a CAPITAL *Crime*, whereof He was innocent,) would have been, in Point of real Guilt, an aggravated and atrocious Murder, He ſaid, if it had *ſucceeded* according to their Intention; and even now deſerved a very exemplary Puniſhment, notwithſtanding it had *not* ſucceeded according to their Wiſh.

* *V.* 2 *Inſt.* 384. Where it is ſaid "that the *Villainous* Judgment (there particularly ſpecified,) *remains* a conſtant Law, in ſuch Caſes as the preſent, *to this Day*."

But Mr. *Gould* and Serj. *Davy* agreed that they could find *no Inſtance* or *Entry* of ſuch a Judgment ACTUALLY given. *V. ante* 996, 997.

John Spragg (the Father) was ſentenced to be remanded to the Priſon of this Court, for One Month; To be ſet twice, in and upon the Pillory, (for an Hour each Time,) Once at *Charing-Croſs*, and again at the *Royal Exchange*; To be impriſoned, in the Priſon of this Court, for two Years from the End of the ſaid Month; To pay a Fine of 50*l.* to the King; To find Security for his good Behaviour for 3 Years, (Himſelf in 40*l.* and Each Security in 20*l.*) And to be committed *quouſque*.

* She ſeemed to be under 20.

Mary, the Daughter, (being conſidered by the Court as leſs Criminal, partly from her * Youth, and partly as She was under the Direction and Influence of her Father,) was only committed to the Cuſtody of the Marſhal, to be impriſoned for the Space of 6 Months from this Time.

† Note—They had been, Both of them, *already in Cuſtody*, (in Town and Country) near a Year and a half.

Thurſday 12th *June* 1760.

Lancaſter *verſ.* Thornton.

THIS was a Caſe out of Chancery for the Opinion of this Court: The Subſtance whereof was as follows.

George Lancaſter being ſeiſed in Fee of ſome Lands (the Premiſes in queſtion) and poſſeſſed of other Lands for a Term of Years, made his laſt Will and Teſtament dated the 3d of *June* 1734; Which, after having given certain Legacies, goes on thus——"I do "hereby

" * hereby *Charge and make Chargeable* All and every my * P. 1028.
" Lands and Inheritance and Leaſehold with the Payment
" of my Debts Funeral Expences and Legacies: And for
" more ſpeedy raiſing Money for Payment of them, *I deviſe*
" to *George*, *Edmund*, and *Dorothy Lancaſter* (who were his
" two Sons and his Daughter) their Heirs Executors and
" Adminiſtrators, the *Leaſehold* Eſtate (deſcribing it,) for
" all the Reſidue of the Term therein to come &c; Upon
" Truſt to ſell the ſame &c, and to apply the Money &c to
" the Payment of my Debts Legacies and Funeral Ex-
" pences." But *in Caſe* the Money ariſing from the Sale of the ſaid Leaſehold Eſtate ſhall not be ſufficient to pay and diſcharge All his Debts Legacies and Funeral Expences, Then He *deviſes* " *That his ſaid two Sons and Daughter* SHALL
" AND MAY ABSOLUTELY SELL *mortgage or otherwiſe*
" *diſpoſe of his* FREEHOLD *Eſtate*, for the Payment of ſuch
" of his ſaid Debts Legacies and Funeral Expences, as his
" ſaid Leaſehold Eſtate ſhould not be ſufficient to pay and
" diſcharge." And *from and immediately after Payment of All his Debts Legacies and Funeral Expences*, He deviſes the ſaid Freehold Eſtate or ſo much of it as ſhould remain after ſuch Payment of his Debts Legacies and Funeral Expences as aforeſaid, to *Thomas Dobſon* and *James Lancaſter* and their Heirs and Aſſigns: Upon Truſt that They and the Survivor of them and his Heirs ſhould ſtand ſeiſed thereof (except a Parlour and Room over it, which He deviſed to *Dorothy* ſo long as She ſhould remain unmarried,) To the Uſe of his Son *Edmund* for Life, without Impeachment of Waſte; and from and after the Determination of that Eſtate, to the ſaid *Thomas Dobſon* and *James Lancaſter* and their Heirs during his Life, to ſupport &c; with Remainder to the Heirs Male of the Body of the ſaid *Edmund*; Remainder to the ſaid *Thomas Dobſon* and *James Lancaſter*, for the Term of 1000 Years, to raiſe 120*l.* for his Grand-Daughters (the Daughters of ſaid *Edmund*.) Then He deviſes the Remainder, ſubject to the ſaid Term, to the Uſe of his Son *George*, in Tail Male; with Remainder to his Grandſon *George*. And He appoints his ſaid Sons *Edmund* and *George* and his Daughter *Dorothy*, his Executors.

The Teſtator died, and left two Sons, *viz.* the ſaid *Edmund* his Eldeſt Son and Heir, and *George*; and two Daughters, *viz* the beforementioned *Dorothy*, and *Hannah*.

Edmund entered, and proved the Will.

The LEASEHOLD-*Eſtate* was NOT *ſufficient* to pay and diſcharge the Teſtator's Debts Legacies and Funeral Expences.

Edmund ſuffered a *Recovery*, to the Uſe of Himſelf in Fee: And in 1740, He made a Mortgage to ſecure a Bond-Debt to One *Machil*, upon a Bond made by the Teſtator, whereby the Teſtator had bound his Heirs.

Some

*P. 1029. * Some of the Teſtator's Debts are ſtill remaining due and unpaid.

Edmund died, leaving Iſſue two Daughters

George filed his Bill in Chancery, to eſtabliſh the Will; and inſiſted "that the Deviſe to *Thomas Dobſon* and *James* "*Lancaſter never took Effect in Poſſeſſion*; as the Debts Le- "gacies and Funeral Expences were *not paid*:" And He inſiſted "that the *Freehold Eſtate*, ſubject to the ſaid Debts "*&c*, does therefore belong to *Him*, in Tail Male."

On the other hand, The Daughters of *Edmund* inſiſt "that the Recovery was well ſuffered by their Father, *Ed-* "*mund*; and that *They* are intitled to the *Freehold Eſtate*, "ſubject to the Mortgage abovementioned."

The LORD KEEPER directed the following Queſtion to be referred to this Court for their Opinion; *viz.*

Whether, by Virtue of theſe Words, *viz.* "In caſe the "Money ariſing from the Sale of the Leaſehold Eſtate "ſhall not be ſufficient to pay and diſcharge All the "Teſtator's Debts Legacies and Funeral Expences, "That then He *deviſes* that his two Sons and his "Daughter SHALL AND MAY ABSOLUTELY SELL "*mortgage or otherwiſe diſpoſe of* his Freehold Eſtate, "for the Payment of ſuch of his ſaid Debts Legacies "and Funeral Expences as his ſaid Leaſehold Eſtate "ſhould not be ſufficient to pay and diſcharge"—Any ESTATE paſſed to *Edmund*, *George*, and *Dorothy*; Or ONLY *a* POWER *to ſell*.

It was argued on *Tueſday* 10th *June* 1760.

Mr. *Aſhurſt*, for the Plaintiff *George Lancaſter*, though He admitted that, *in general*, where the Deviſe was "That "the Teſtator's Executors *ſhould* ſell his Land for the Pay- "ment of Debts *&c*," the *legal* Eſtate will *not* paſs, never- theleſs argued that in the preſent Caſe, a *Conditional Fee paſſed to the Executors*, either by expreſs *Words*, or at leaſt by the *Intention* of the Teſtator.

1ſt. As to the *Words*. The Teſtator uſes the Words "*Deviſe*;" which alone is ſufficient to paſs an Eſtate. And *Litt.* § 383. proves "that a defeazible Eſtate will paſs to "Executors by a Deviſe of Tenements, *to be ſold* by his "Executors." And there is * no Difference between a De- viſe, "to be ſold by Executors; and a Deviſe to them, *to* "*ſell*.

* So is *Co. Litt.* 236. *a.* Yet ſee *Co. Litt.* 112. *b.*

2dly.

* 2dly. But the *Intention* plainly is, to convey a *legal* Eſtate. The Teſtator's primary Intention was the certain and ſpeedy Payment of his Debts Legacies and Funeral Expences. And this Intention will be beſt anſwered, by conſtruing it to be a Deviſe of the *legal* Eſtate. The Caſe in 10 *H.* 7. cited in *Plowden* 414. *a.* is ſimilar to this: Where *Ceſtuy qui Uſe* deviſed " That his Wife, being his Executrix, " *ſhould ſell* his Land," and died; and She ſold it to her ſecond Huſband; And this was adjudged a good Sale. In 1 *Vern.* 45. *Newman* v. *Johnſon*, a Deviſe " of all his " Eſtate, both Real and Perſonal, to *J. S.* my Debts and " Legacies being firſt deducted," was holden to amount to a Deviſe " to ſell, for Payment of his Debts." The *Intention* is alſo apparent from *other* Parts of this Will. For *if* it was only a *bare Power* to ſell mortgage &c, the Eſtate muſt *deſcend* to the Heir at Law, in the mean Time; who would NOT be compellable to refund or to account for the Rents and Profits which he ſhould receive prior to the Sale; even though the whole Real and Perſonal Eſtate ſhould not ſuffice to anſwer the Charge of the Debts Legacies and Funeral Expences. A Deviſe " That they *ſhall and may* ABSO- " LUTELY SELL *mortgage or otherwiſe diſpoſe* of his E- " ſtate," gives them an ESTATE in the Land; and includes giving them the Rents and Profits; Eſpecially, as the Heir would be *unaccountable* for them, if they were to deſcend to him, till Sale &c: And the rather ſtill, for that the Teſtator has taken *expreſs* Notice of his Heir at Law, by a *particular Bequeſt to him.* * P. 1030.

Mr. *Clayton*, for the Defendant (the Heir at Law) and alſo (as he ſaid) for the Mortgagee, argued that NO LEGAL ESTATE paſſed to the Executors; but *only a* POWER to ſell mortgage or otherwiſe diſpoſe of this Eſtate, in Caſe the Leaſehold Eſtate ſhould prove deficient.

And He inſiſted that this Conſtruction was agreeable both to the *Words* of the Will and to the *Intention* of the Teſtator.

There are many Caſes where the Word " *Deviſe*" is uſed, and yet no Fee paſſes. Sir *William Jones* 327. *Dike* v. *Ricks*. *Cro. Car.* 335. S. C. and a Caſe in 1 *Leon.* 31. *Caſe* 38. *Tr.* 23 *Eliz.* in *C. B.*

1 *Inſt.* 113. *a.* is agreeable to *Windham*'s Opinion in 1 *Leon.* 31. " that the Vendee is in by the *Deviſe*, and *not* by " the Conveyance of the Executors;" And to *Plowd.* 414. *a.* (the cited Caſe in 10 *H.* 7.) 1 *Inſt.* 236. *a.* comments upon, explains and diſtinguiſhes the Text of *Littleton* § 383. (cited by Mr. *Aſhurſt*,) and ſhews the Diverſity between a Deviſe " that his Executors *ſhall ſell*," and a Deviſe " *to* " his

* P. 1031. " * his Executors to be ſold :" The former of which is a bare naked Power.

And here is Nothing at all *deviſed to* the Executors: They have *only a bare Power to ſell &c.*

The Caſe of *Yates* and *Compton*, in 2 *P. Wms.* 308, 309. proves " that the legal Eſtate did *not* paſs."

Though the Deviſe be *general*, " That they ſhall and " may abſolutely ſell mortgage or otherwiſe diſpoſe of;" It is ſtill *Nothing more* than a POWER.

And as to the intermediate Rents and Profits from the Death of the Teſtator till Sale or Mortgage or other Diſpoſal, the Heir at Law will be *accountable* for them, if he receives them: And they may be come at, by Application in Equity, or otherwiſe.

Mr. *Aſhurſt*, in Reply, relied on the *Intention* of the Teſtator; who meant, he ſaid, that No One ſhould take Benefit, *till* after his Debts Legacies and Funeral Expences ſhould be paid.

Lord MANSFIELD thought it a plain Caſe.

Here are *no* WORDS by which the Eſtate is deviſed *to* the Executors. Therefore, *if* it be conſtrued, that there *is* a Deviſe to them, it muſt be raiſed by *Implication*. But, by the Frame of the Will, it is plain that the Teſtator did NOT *ſo intend:* For he ſhews, by the Expreſſions that he has uſed, that He *knew the Diſtinction* between a Deviſe of an *Eſtate* TO *them*, and giving them only a *Power to ſell*. As to the Term " *Deviſe* ;" The Expreſſion " *I deviſe*," is here ſynonimous to ſaying " *I will*," or " *my Mind is*."

The INTENTION of the Teſtator, Mr. *Aſhurſt* ſays, cannot be complied with, in this Caſe, *without* an Implication of a Deviſe *to* the Executors; becauſe it muſt otherwiſe deſcend to the Heir at Law in the mean Time; Who, he ſays, would NOT *be chargeable* with the intermediate Rents and Profits, but altogether *unaccountable* for them.

That, clearly, is *not* ſo. The Land could only deſcend to the Heir, ſubject to the Charges; and would be liable, in his Hands, to the Payment of Debts Legacies and Funeral Expences. So that the Teſtator's Intention is equally anſwered, One Way, as the Other.

The Certificate was as follows—Having heard Counſel on both Sides, and conſidered this Caſe, (which the Parties delayed

* delayed bringing on to be argued, until this Term,) We are of Opinion That NO ESTATE paſſed to the ſaid *Edmund George* and *Dorothy Lancaſter*; but *only* a POWER to ſell demiſe mortgage or otherwiſe diſpoſe of the Premiſſes. * P. 1032.

Moultby *verſ.* Richardſon.

MR. *Howard* moved that the Defendant might be diſcharged on *Common Bail*; the Affidavit to hold to Bail, being only "That the Defendant was indebted to the "Plaintiff in ſuch a Sum, AS *He computes it.*"

But Mr. Juſt. FOSTER and Mr. Juſt. WILMOT (the only Judges then in Court) thought it ſufficient: And they added "That Caſes of * this Sort had gone a great Way;" (intimating that they had gone full far.) †

† *V. ante* 655, 656.

† See *Barclay et al.* v. *Hunt. M.* 1766. 7 G. 3. *B. R.*

MOTION DENIED.

Ferguſon et Ux' *verſ.* Corniſh.

Friday 13th *June* 1760.

THIS was upon a Demurrer by the Defendant, to a Declaration in an Action of Covenant upon an Indenture of Leaſe, aſſigning a Breach in Non-Payment of Rent.

The Declaration ſet forth that *Adam Harper* and *Phœbe* his Wife demiſed the Premiſſes to the Defendant *John Corniſh*, from &c, for 7, 14, OR 21 Years, *as the Leſſee (Corniſh) ſhould think proper*; at 60*l. per Annum* Rent; And the Defendant covenanted to pay to the ſaid *Adam Harper* and *Phœbe* his Wife, THEIR Executors Adminiſtrators and Aſſigns, the ſaid Rent, during the *ſaid* TERM; And that *Corniſh entered*, and was poſſeſſed, and *continues in Poſſeſſion.* Then it ſhews the Death of *Adam Harper*, and the Intermarriage of *Phœbe* with the now Plaintiff *Ferguſon*; and that ſo much Rent &c, became due and in Arrear; And aſſigns the Breach in this, that the Defendant has not paid &c (in the Words of the Covenant,) TO *the Plaintiff Ferguſon and Phœbe his Wife.**

*Note-The Arrear of Rent upon which the Breach is aſſigned, was alledged to have been incurred *within the* FIRST *ſeven Years.*

To this Declaration, there was a General Demurrer by the Defendant; And a Joinder in Demurrer, by the Plaintiffs.

Mr. *Eyre*, for the Defendant, argued in Support of the Demurrer.

Queſtion—

* P. 1033. * Queſtion—Whether the Plaintiffs have made a *good Aſſignment* of a Breach, in Non-Payment of Rent ſuppoſed to have become due upon *this* Leaſe.

1ſt Objection—This Covenant is a *relative* Covenant: 'Tis to pay *for and during* a TERM of 7, 14, or 21 Years. But *if* NO *Term* was ever granted, the Covenant fails.

Now NO *Term* was *created* by this Indenture: For it is VOID *for Uncertainty*. This appears from the two following Caſes.

Plowd. 273. *Say* v. *Smith and Fuller*, proves "That "every Contract ſufficient to make a Leaſe for Years ought "to have CERTAINTY in three Limitations; namely, the "*Commencement*, *Continuance*, and *End* of the Term."

6 *Co. Rep.* 35. *The Biſhop of Bath's Caſe*, lays it down, "That the *Certainty* of CONTINUANCE is to be intend-"ed, Either where the Term is made certain by an *expreſs* "*Enumeration of Years:* Or by *Reference to Certainty*; or "by *reducing* it to Certainty, by *Matter ex poſt Facto*, or by "*Conſtruction in Law* by expreſs Limitation."

Therefore, the *Habendum* in this Leaſe is *void* for UNCERTAINTY. It is a Demiſe, to hold from *Michaelmas &c*, for the Term of 7, 14, *or* 21 Years, *as the Leſſee ſhall think proper*. Now, *if* the Leſſee ſhould not elect, the Leaſe could *never* COMMENCE.

But, at leaſt, the CONTINUANCE of it is quite *uncertain*. It is *not* (as the uſual Way of making theſe Leaſes is,) a Leaſe *for* 21 *Years* certain, covenanted to be defeaſible at the Election of the Leſſee; *nor* is it made certain by any *Reference* to a Thing which has Certainty at the Time of the Leaſe made; *Nor* is there any Thing *ex poſt facto* to be done, or averred to have been done; (And the Leſſee's Entry determines Nothing; It can be no more than *Evidence*, even *after* 7 Years Poſſeſſion;) *Nor* can here be any *Conſtruction of Law, by expreſs Limitation.*

2d Objection—But if the Court ſhould think it to be a *ſubſiſting* Covenant; then a 2d Queſtion will ariſe, "Whe-"ther it ſubſiſts *between the* PRESENT *Parties.*"

The Covenant is, "to pay to the *deceaſed* Huſband *and* "his Wife, (*Adam Harper* and *Phœbe*,) and to THEIR "Executors Adminiſtrators and Aſſigns." Therefore the *Executors of the deceaſed Huſband* ought to have joined in this Action.

3d Ob-

* 3d Objection goes to the *Manner of aſſigning the Breach:* It ought to have been ſhewn "that the Rent was *not paid* "to the EXECUTORS *of the Huſband.*" * P. 1034.

Lord MANSFIELD—The Leſſee has certainly *entered* and continues in *Poſſeſſion:* And it is as certain, that he *muſt pay the Rent.*

It is undoubtedly a good Leaſe for 7 Years; (whatever may be the Validity of it as to the other two eventual Terms, of 14 and 21 Years:) And the Breach is aſſigned for Non-Payment of Rent incurred *within the firſt Seven* Years.

Mr. Serj. *Poole* was for the Plaintiff: But the Chief Juſtice was ſo clear in his Opinion, that there was no need for Him to interfere; nor did He.

Per Cur. JUDGMENT for the PLAINTIFFS.

Hewſon *verſ.* Brown.

MR. *Winn* moved, on behalf of the Plaintiff, for an ORDER upon the proper *Officer of the Court of* COMMON PLEAS, TO ATTEND HERE with the *Record* of *that* Court (between *Watſon* v. *Hewſon*) in Order for its being inſpected by this Court.

The Defendant in *this* Court, who was ſued *here* upon a Bond to indemnify the preſent Plaintiff, had pleaded "*Non* "*damnificatus:*" To which Plea, the Plaintiff replied a *Recovery* in the Court of Common Pleas againſt him, by one *Thomas Watſon*; whereby he was damnified. To this Replication, the Defendant here had rejoined "*Nul tiel Re-* "*cord.*" And the Plaintiff ſur-rejoined, "That there *is* "ſuch a Record."

Mr. *Winn* acknowledged that the *ordinary* Courſe and Method of Practice in theſe Caſes, was to iſſue a CERTIORARI, and have it *certified*; And He alſo acknowledged that he could not find any Precedent that came up to the preſent Caſe: But he urged that it would ſave Time and Expence: and that this Court by their *General Juriſdiction*, had ſuch a Power over all *inferior* Juriſdictions.

But Lord MANSFIELD and the * Two other Judges now in Court were very clear that as here was no Sort of Reaſon to go out of the common and ordinary Courſe, It would be wrong to break the eſtabliſhed Rules and Methods of Proceeding: And therefore They

* Mr. Juſt. *Deniſon* was abſent.

DENIED the Motion.

* P. 1035. * Rex *verſ.* Inhabitants of Hitcham.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT CASES, pa. 504. N°. 161.

Saturday 14th June 1760.

Rex *verſ.* Pemberton.

ON ſhewing Cauſe againſt a Rule for quaſhing an Indictment on 5 *Eliz. c.* 4. § 31. for exerciſing the Occupation of a TANNER, not having ſerved an Apprenticeſhip therein for *Seven* Years.

Mr. *Sayer*, on the Part of the Defendant, objected,

1ſt. That though the Trade of a *Tanner* was undoubtedly a Trade uſed within the Realm of *England* at the Time of making this Act of 5 *Eliz.* yet it was *not meant and intended to be* INCLUDED *in this probibitory Clauſe*; being at that very Time under Regulation by *other* Statutes (no leſs than 16 in Number) made for the Purpoſe of regulating it; and particularly, by 1 *Eliz. c.* 9. which allows the Uſe of it to Apprentices or Covenant-Servants brought up in that Trade *Four* Years: And another Statute made in the very ſame Year with the preſent One, *viz.* 5 *Eliz. c.* 8. deſcribes who may be Tanners. So that it can not be imagined that *this* Occupation was ever meant to be included in the Prohibition of 5 *Eliz. c.* 4. § 31.

And though both theſe Statutes (of 1 *Eliz. c.* 9. and 5 *Eliz. c.* 8.) are *now* repealed, yet they are equally an Argument to ſhew the Conſtruction of the Clauſe in queſtion, as if they ſtood unrepealed: And ſo the Court conſidered a repealed Statute, in conſtruing the unrepealed One of 43 *Eliz. c.* 2. in the Caſe of *Rex* v. *Loxdale et al'*, *H.* 1757. 30 *G.* 2. *B. R.*

2d Objection.—IF the Trade of a *Tanner* was meant to be included in the prohibitory Clauſe of 5 *Eliz. c.* 4. § 31. yet that Statute was, *as to this particular Trade or Occupation*, REPEALED

* REPEALED by the 5 *Eliz. c.* 8. and 1 *J.* 1. *c.* 22. § 5. * P. 1036. which are *repugnant* to, and conſequently a *virtual Repeal* thereof, ſo far as concerns *this* Trade. The former is indeed now repealed: But the latter is not. They admit of 5 *or* 6 OTHER *Qualifications* beſides having ſerved an Apprenticeſhip for 7 Years; Namely, Such as *then had Tan-houſes* and *uſed* the Trade; Alſo the *Wives* and *Sons* of *Tanners* having uſed the Myſtery four Years; Alſo ſuch Perſons as ſhould *marry* the Wives or Daughters, to whom Tan-houſes and Fats ſhould be left. So that there are now *many other Qualifications* that juſtify uſing the Trade, *beſides* that of Serving a 7 Years Apprenticeſhip.

3d Objection.—An Indictment will not therefore now lie upon 5 *Eliz. c.* 4. § 41. *alone* and *generally:* But it ought to SPECIFY all theſe OTHER *Qualifications* allowed by the ſubſequent Statute; and to ſhew that the Party is *not within any of them*; as is done in Convictions upon the Game-Acts, and Convictions for Swearing, and upon the Act of 8, 9 *W.* 3. *c.* 26. "for the better preventing Counterfeiting the "current Coin of this Kingdom." And for this, He cited * *Rex* v. *Maurice Jarvis*, *H.* 1757. 30 *G.* 2. and *Rex* v. † *Sparrow*, (as He called it,) where a Conviction for prophane Curſing and Swearing was quaſhed, becauſe it did not alledge "That the Defendant was *not* a Servant, Labourer, "Common Soldier or Sailor."

* *V. ante* 148 to 151.
† *Rex* v. *Sparling*, *H.* 8 *G.* 1. S. C.

This Indictment is upon a Statute not favoured: And the Caſe is the harder upon the Defendant, and the more oppreſſive, for that he is under another Indictment on 1 *J.* 1. *c.* 22.

Mr. *Norton*, for the Proſecutor, having been heard in Anſwer to the Objections; and having made the proper Diſtinctions between the Caſes cited and the Caſe now in queſtion;

THE COURT were unanimouſly of Opinion—That *whatever Licenſe* might be given by any Statute *ſubſequent* to 5 *Eliz. c* 4. to Perſons who had not ſerved a Seven Years Apprenticeſhip, to exerciſe the Trade of a Tanner under certain *other Qualifications* therein deſcribed; Yet, as the Trade of a Tanner was clearly a Trade *uſed* at the Time of making the 5 *Eliz. c.* 4. (and ſeems acknowledged even by 1 *J.* 1. *c.* 22. § 5. to be *included* in 5 *Eliz. c.* 4.) It is *not neceſſary*, in an Indictment *upon* 5 *Eliz. c.* 4. § 31. for having uſed this Trade without having ſerved ſuch an Apprenticeſhip, to *aver* the *Want of the* OTHER *Qualifications*, which by the *ſubſequent* Statute intitle a Perſon ſo qualified, to uſe the Trade: But ſuch *other* Qualifications or Exceptions muſt be SHEWN BY THE DEFENDANT, by Way of Excuſe, either by *Plea*, or in *Evidence*. It is enough for the Proſecutor to bring the Caſe within the General Purview of the

* P. 1037. * Statute *upon which* the Indictment is founded; if that Statute has *General prohibitory Words* in it. For where an Indictment is brought *upon* a Statute which has *general prohibitory Words* in it, it is ſufficient to charge the Offence *generally*, in the Words of the Statute: And if a *ſubſequent Statute*, or (as Mr. Juſt. *Foſter* and Mr. Juſt. *Wilmot*, who ſpoke after Lord *Mansfield* and Mr. Juſt. *Deniſon*, added,) even a Clauſe of *Exception* contained in the *ſame* Statute, excuſes Perſons under ſuch and ſuch Circumſtances, or gives Licenſe to Perſons ſo and ſo qualified, ſo as to *excuſe* or *except* them out of the general prohibitory Words, *That* muſt come *by Way of Plea, or Evidence*, "That the Party is not within "ſuch general Prohibition, but *excepted* out of it."

Indeed, where the Words of a Statute are deſcriptive of the *Nature* of the Offence, or the *Purview* of the Statute, or neceſſary to give a *ſummary* Juriſdiction, *there* it is neceſſary to ſpecify in the particular Words of ſuch Statute. In the Statute to prevent Counterfeiting the Coin (8, 9 *W.* 3. *c.* 26.) it is the Purview of the Statute; not a general Prohibition: 'Tis Deſcription—"Any Smith, Engraver, "Founder, or other Perſon or Perſons whatſoever, other "than and except the Perſons employed in or for his Ma-"jeſty's Mint &c."

N. B. Mr. Juſt. FOSTER ſaid, He believed there were not leſs than a hundred Trades mentioned in other Clauſes of 5 *Eliz. c.* 4. And that He had once taken the Pains to extract them and range them alphabetically.

Per Cur. unanimouſly,
The RULE to ſhew Cauſe Why the Indictment ſhould not be quaſhed, was DISCHARGED.

Tueſday 17th June 1760.

King's Bench Priſoners *verſ.* Marſhelſea Priſoners: on Mr. Frederick Aſhfield's Will.

THIS was a Claim of a Legacy, ſuppoſed by the Priſoners in the Priſon of this Court to be left to *Them:* And the Matter came on (by Order of the Court,) in the Paper, to be argued. The ſhort and ſingle Queſtion was "Whe-"ther the following Bequeſt was made to the *Priſoners* in "the Priſon of *this* Court, or to Thoſe who were in the "Priſon of the *Palace* Court."

Frederick

* *Frederick Aſhfield*, of *Richmond* in *Surrey*, Gentleman, deviſed his Copyhold Eſtate (already ſurrendered to the Uſe of his Will,) and alſo all his perſonal Eſtate, (after &c,) to Truſtees to be ſold; and directed the Produce to be laid out in Freehold Lands. Then he further directs, that his Truſtees ſhall, for ever, iſſue pay and diſpoſe of the Rents and Profits, unto and amongſt ſuch Perſons, who, for the Time being, ſhall be poor Priſoners and inſolvent Debtors *in the* MARSHELSEA *Priſon in the Burrough of Southwark in the County of Surrey*, and real and fit Objects of Charity; for and towards their Subſiſtence during their reſpective Impriſonments *there*; in ſuch Manner, and in ſuch Parts and Proportions, as his ſaid Truſtees and the Survivors of them and their Heirs ſhould from Time to Time order direct and appoint. * P. 1038.

Mr. *Gould*, for the Priſoners in the Priſon of *this* Court, argued that this Deviſe belongs to the Priſoners of *this* Court.

The Juriſdiction of this Court, in the preſent Queſtion, depends upon the Act of 32 *G.* 2. *c.* 28. § 9. which gives Power to the ſeveral Courts therein named, to examine into and order Payment of Bequeſts made to poor Priſoners in the ſeveral Gaols or Priſons within their reſpective Juriſdictions. By which Order, the Priſoners of *this* Court will be *bound*, if the Determination ſhall turn *againſt* them: But the Priſoners of the *Palace-Court Priſon* will *not* be bound by *any* Determination of the Judges of *this* Court; in Favour of the Priſoners of *this* Court.

The Deviſe is "to the Priſoners in the MARSHALSEA-"PRISON *in the Burrough of Southwark:*" Which muſt mean *the Priſon of this Court*.—In Support whereof, He cited *Co.* 10 *Rep.* 69, 71, 72. The Caſe of the *Marſhalſea*; and *Spelman's Gloſſary*, Title *Marſhal*. And He obſerved that the Defendant who is a Priſoner in the *King's Bench* Priſon is, and is always ſuppoſed (in the Declaration againſt him) to be *in Cuſtod' Mareſchalli* MARESCHALSIAE *Domini Regis:* The other, (the Defendant in the *Palace-Court,*) *in Cuſtod' Mareſchalli Mareſchalſiæ* HOSPITII *Domini Regis*. He alſo cited 1 *Bulſtr.* 207 to 212. *Cox* v. *Gray*, at large: And argued that therefore, *propter Excellentiam*, this Deviſe is to the Priſoners of the Priſon of THIS Court.

Mr. *Field*, *contra*, for the Priſoners of the *Palace-Court*, argued and ſufficiently ſhewed that this Deviſe *muſt* be underſtood to be to the Priſoners in the Priſon of the *Marſhal of the* HOUSE-HOLD.

Lord

* P. 1039. * Lord MANSFIELD was clearly of that Opinion. He obſerved, that not only in vulgar Speech, but likewiſe in many Acts of Parliament, the Priſon of *this* Court is called the KING'S BENCH Priſon; and the * *Other* is called the MARSHALSEA-Priſon. Both of them indeed are in the Burrough of *Southwark*: But Each of them has its reſpective Appellation. And this Teſtator uſed the Name that was always uſed by every Body elſe in *Common Parlance*; without ſearching *Spelman's Gloſſary* or my Lord *Coke*'s or *Bulſtrode's Reports*, to find the *ſtrict* and *legal* Name. This is a ſufficient Reaſon for Us, *not* to make any *Order* at all in the preſent Caſe.

* *V. Cowel's Interpreter, ſub verbo Marſhalſee*, expreſsly *accord*': Alſo *Blount's Nomolexicon, Marſhalſee.*

Note—
This reſpective Appellation of each of theſe Priſons was agreed by the Marſhal of this Court, (on Appeal to his own Candor, by Lord *Manſfield*,) to be the Name uſed in Common Parlance.

Therefore No RULE was taken.

Thurſday 19th June 1760.

Rex *verſ.* Pearſon.

MR. *Baynham* moved, upon the uſual Affidavit, that the Defendant might be admitted to defend *in Forma Pauperis.*

But upon its appearing that this was *upon an Attachment for a Contempt*, and NOT *a* CAUSE *in Court*; And Mr. *Baynham* not being able to produce any Precedent of ſuch a Rule having ever been made where *no Cauſe* was depending in Court:

The MOTION was DENIED.

Margaret Hutt's Caſe: or Rex *verſ.* Bowmaſter and Epworth.

ON this Woman's offering to exhibit Articles of the Peace againſt theſe two Perſons, It appeared that the Facts charged were done at *Portſmouth.*

Whereupon the COURT objected to Her, that She might as well have applied to a Juſtice of Peace in the Neighbourhood: And then the Defendants would not be under a Neceſſity of Coming up to *London*, to put in Bail.

It was anſwered, That if there ſhould be any particular Inconvenience ariſing therefrom, there might be a *Mandamus*

* *mus* to a Juſtice of Peace in the Country impowering Him to take the Security *there:* And of this, Mr. *Harvey* (as *Amicus Curiæ)* mentioned ſeveral Inſtances within his own Obſervation and Memory. * P. 1040.

At length, Mr. *Athorpe* (Secondary of the Crown-Office) propoſed, and The COURT came into this Expedient, *viz.* That on iſſuing the Attachment of the Peace, which is of Courſe made out upon the Court's receiving the Articles praying Security of the Peace, an *Indorſement* ſhould be at the ſame Time made thereon, authorizing and directing any Juſtice or Juſtices of Peace in that County *(Southampton)* to take the Security of the Peace there; ſpecifying the particular Sums wherein the Principals and alſo their Sureties ſhould be bound.

Per Cur.
It was ORDERED accordingly.

Rex *verſ.* Moreley; Rex *verſ.* Oſborne; Rex *verſ.* Reeve; and Rex *verſ.* Norris.

Saturday 21ſt June 1760.

MR. *Knowler* and Mr. *Filmer* ſhewed Cauſe againſt the *iſſuing* of a CERTIORARI to remove ſeveral Orders made by Mr. *Monypenny*, a Juſtice of Peace in *Kent*, upon the CONVENTICLE-*Act*, 22 *Car.* 2. *c.* 1: By which Orders he had convicted a Methodiſt-Preacher, and the Maſter of the Houſe wherein He preached, and Several of the Audience, in the reſpective Penalties following.

The * Preacher *(Moreley)* was convicted in 20*l.* The †Maſter of the Houſe *(Oſborne)* in 20*l.* and Several of ‡ the Perſons preſent, in 5*s.* a-piece. Two of the Auditors *(Reeve* and *Norris)* had had 10*l.* ‖ a-piece levied upon them, (by virtue of the 3d Section of this Act,) the Preacher Himſelf not being to be found. The Penalty had been levied upon *Oſborne*, (the Maſter of the Houſe,) as well as upon *Reeve* and *Norris*. They had All appealed (within the Week) to the Seſſions: And Mr. *Monypenny* had returned to the Seſſions, the Monies levied, and certified the Evidence, with the Record of the Conviction, agreeable to the Directions of the 6th Section; And the Defendants had pleaded and been *tried by a Jury* at the Quarter-Seſſions; And there had been both *Verdict* and *Judgment* given againſt them.

* *V.* Sect. 3. † *V.* Sect. 4. ‡ *V.* Sect. 1. ‖ *V.* Sect. 5.

Mr. *Knowler* and Mr. *Filmer*, on behalf of the Proſecution, urged, that after All this had paſſed, a *Writ of Error* might lie; but *not* a CERTIORARI, which will only lie when there is *no other Remedy*.

And

* P. 1041. * And there is a Clauſe in the 6th Section, which is expreſs, "That NO *other Court* WHATSOEVER *ſhall intermeddle* with any Cauſe or Cauſes of Appeal upon this Act: "But they ſhall be *finally* determined in the Quarter-Seſſions "ONLY." Which *Negative* Words muſt include *All* the Courts of Judicature in the Kingdom, and this Court in particular, as being moſt likely to meddle with Matters of this kind.

And the 13th Section directs "that this Act, and *all* "*Clauſes* therein contained, ſhall be *conſtrued moſt largely* "*and beneficially* for the *Suppreſſing* of Conventicles, and "for the *Juſtification* and *Encouragement* of all Perſons to "be employed in the Execution thereof; And that no Re"cord Warrant or Mittimus to be made by Virtue of this "Act, *or any Proceedings thereupon*, ſhall be reverſed avoided "*or any Way impeached*, by reaſon of any *Default in Form*."

Therefore, to *what Purpoſe* ſhould a *Certiorari* iſſue, when the Court can neither intermeddle with the *Fact or Form?*

The *Penalties* are (by the 2d Section) to be *diſtributed* into three Parts; $\frac{1}{3}$ to the King, $\frac{1}{3}$ to the Poor, $\frac{1}{3}$ to the Informer: And theſe Penalties *have been* ſo diſtributed; And this Court can *not order Reſtitution.*

As to the Penalties *under* 10*s.* the Act gives *no Appeal:* If the Juſtices have done wrong in the Matter of *theſe*, 'tis in a Matter *coram non Judice.*

Mr. *Knowler* and Mr. *Filmer* had Affidavits of the Facts which they alledged.

Lord MANSFIELD aſked them, Whether the Negative Words in the 6th Section would not conclude ſtrongly againſt a *Writ of Error.*

Mr. *Knowler* and Mr. *Filmer* anſwered, That as to *Fact*, they might; but, perhaps, *not* as to *Law.* They cited a little printed Book, ſaid to be written by Ld. Ch. J. *Saunders*, (a Comment on this Conventicle-Act) *Fo.* 69. § 6. & § 13. Which ſhewed *Him* to be of Opinion "That *no Certiorari* "would lie upon it."

Mr. Juſt. DENISON obſerved, "That there have been "many Determinations to the Contrary ſince."

Mr. *Norton*, Mr. *Stow*, and Mr. *Leigh*, who were for the *Certiorari*, inſiſted That the *General* Juriſdiction of *this* Court is *not* taken away by *mere negative Words* in an Act of Parliament:

* liament: This Court ſhall *never* be *ouſted of its Juriſdiction* without *Special* Words. Dr. *Foſter*'s Caſe, 11 *Co.* 64. *b.* 1 *Ro. Rep.* 92, 94. S. C. 1 *Ventr.* 66. *Smith*'s Caſe. 1 *Mod.* 45. S. C. * P. 1042.

Beſides, Theſe Words "That no other Court whatſo-"ever ſhall intermeddle *with any Cauſe or Cauſes of Appeal*; "but that *they* ſhall be finally determined in the Quarter-"Seſſions only;" mean no more than that the FACTS ſhall *not be re-examined:* But the *Legality* may; or a *Want of Juriſdiction* may be taken Advantage of. The Caſe *may* be ſuch as that the Juſtices have *no Juriſdiction* of the Matter. And where a Statute does not *expreſsly* and *totidemverbis take away a Certiorari*, and direct "that *no Certiorari* ſhall iſſue," the Court will grant One. And *Peat*'s Caſe, in 6 *Mod.* 228. proves "That a *Certiorari does lie* upon *this* very Act." The Court there ſay, "That the Juſtices of Peace being Judges "of the Matter, *if they Wrong* You, *You* HAVE *your* RE-"MEDY *by* CERTIORARI, or Appeal to the Seſſions." And it appears in that Caſe (at the End of it,) that a *Certiorari* had then *actually iſſued.*

As to the Five of theſe Convictions, which were againſt Perſons *preſent* at this Aſſembly, and under 10 *s.* (namely, only 5 *s.* a-piece,) *No Appeal* is given: And conſequently, there can be no Doubt but that a *Certiorari does lie*, as to *them.*

Mr. *Norton*, being aſked "*What* was the Objection that "he had to theſe Convictions," anſwered, That it was *not alledged* "that the Defendants *were* * *Subjects of this* "*Realm*:" Which is an eſſential Requiſite. * *V.* Sect. 1.

The COURT were unanimouſly of Opinion that a *Certiorari* OUGHT *to iſſue.* A *Certiorari* does not go, to try the *Merits* of the Queſtion; but to ſee whether the *limited* Juriſdiction have *exceeded their Bounds.* The *Juriſdiction* of *this* Court is *not taken away*, unleſs there be *expreſs Words* to take it away: This is a Point ſettled. Therefore a *Certiorari* ought to iſſue: And after a Return ſhall be made to it, You will be at Liberty, and it will ſtill be open to You, to move to ſuperſede it, if there ſhould appear Reaſon for the Court's ſo doing.

RULE made abſolute, for a CERTIORARI.

Rex

* P. 1043. *Wedneſday 25th June 1760.*

* Rex *verſ.* Blooer.

MR. *Norton* and Mr. *Madocks* ſhewed Cauſe againſt the Iſſuing of a MANDAMUS which had been prayed to be directed to One *Samuel Blooer*, a Pariſhioner of *Matfield* in *Staffordſhire* and an Inhabitant of the Chapelry of *Calton* within that Pariſh, (Who had turned Mr. *William Langley* the Curate of that Chapel, out of it, after he had been *Eleven Weeks in Poſſeſſion*, and locked it up,) Commanding him to *reſtore* the ſaid *William Langley*, Clerk, to the Place and Office of CURATE *of the ſaid* CHAPEL.

This Chapel is a *Donative*, and is endowed with *Lands*: And the Inhabitants of 4 different Pariſhes *contribute to the Repair* of it. The Curate of it has a *Stipend*. Mr. *Evans*, the Vicar of *Matfield* ſwore in his Affidavit, "That he *believes* HE has the *Right of Nomination* to it; And that it "has been executed; And that Mr. *Langley* is appointed "and nominated by Him." But there were contrary Affidavits; wherein the Deponents ſwear "That *they* believe "the Right of Nomination to be in the Inhabitants." It appeared that Mr. *Langley* had a *Licence*.

The two Gentlemen beforementioned, Who were Counſel for the Pariſhioner and againſt the *Mandamus*, argued That this Chapel appeared to be a *Donative*; and as the particular Nature of it was not ſtated it muſt be conſidered as only a *private* Chapel, and *not* as a *public* Office: And conſequently, no *Mandamus* will lie.

Beſides, the Right of Nomination is not eſtabliſhed. The Vicar only ſwears "That he *believes* He has the Right of "Nomination:" Which is contradicted by the adverſe Affidavits. And if it were not, Yet a Vicar has Nothing to do with a *Donative*.

They mentioned *Preſcot*'sCaſe, the Chaplain of *Mancheſter* College, reported in 2 *Strange* 797. by the Name of *Dominus Rex* v. *Epiſcopum Cheſter*. But there, they ſaid, were Letters Patent: That College was of the Foundation of the Crown. The Ground of the Court's interpoſing in that Caſe, was becauſe there was no other Remedy.

This Man may have *another Remedy*: He may bring an *Ejectment* for the Farm which He ſays belongs to him as Curate of this Chapel; Or He may have his Action of Treſpaſs.

Every Vicar might as well come for a *Mandamus* to be reſtored, as this Man.

Mr.

* Mr. *Morton* and Mr. *Aſton*, argued for the *Mandamus*; and urged that this was an *Office or Degree* that *concerned the public Weal*; and therefore a *Mandamus* would lie to reſtore to it, upon the Principle laid down by Chief Juſtice *Glyn*, in the Caſe of the Clerk of the City Works of *London*, 2 *Siderfin*, 112, 113. Who ſays that a *Mandamus* ſhall be granted in theſe two Caſes; firſt, to reſtore to an Office which Concerns the Execution of Juſtice; Secondly, If the Office or Degree be for the Weal Public. * P. 1044.

A *Mandamus* will lie to reſtore even a *Sexton*. *Raym.* 211. *Iſle*'s Caſe, Sexton of *Kingſclere*; and 2 *Lev.* 18. S. C. *Rex* v. *Church-Wardens of Kingſclere*. So it will, to reſtore a *Pariſh-Clerk*. 6 *Mod.* 253. *Parker* v. *Clerk*. And ſurely a Curate of a Chapel, with a *Stipend*, is more a *public Officer*, than a *Pariſh-Clerk* or *Sexton* is.

Non conſtat that this is a Donative. But if it be, yet no Licence is neceſſary in Caſe of a Donative; though in the Caſe of a perpetual Curacy, it is neceſſary.

And it is no Objection, to ſay "that We have *another* "Remedy;" if We are intitled to *this*.

The Counſel on the other Side (againſt the *Mandamus*) obſerved that Pariſh-Clerks and Sextons are *temporal* Officers; whereas this was *Eccleſiaſtical*: And a *Vicar* or *Rector* may juſt as well apply for a *Mandamus*, as the *Chaplain of a Donative*.

The Court propoſed to the Parties, to try the Merits in a feigned Iſſue: Which was declined, on the Part of *Blooer*; who inſiſted on taking the Opinion of the Court "Whether the Rule ought not to be diſcharged."

Lord Mansfield—This is a mere *temporal* Queſtion.

Three Objections have been offered againſt making the Rule abſolute.

The 1ſt was, "That there is no ſufficient *Ground* for aſk-"ing a *Mandamus*."

Anſwer. But this Chaplain has ſhewn an *Appointment*, and a *Licence*; and was in quiet *Poſſeſſion* for 11 Weeks.

2d Objection. That he has *not* the Right: For the Nomination was not in the Vicar, but in the Inhabitants.

Anſwer

* P. 1045. * Anſwer. We can not try the Merits upon *Affidavit*. He *claims a Right*, though it is litigated: And that is ſufficient for the preſent Purpoſe.

3d Objection.—That, even ſuppoſing him to have a Title, and to have been in Poſſeſſion, and turned out of it; yet he ought not to be aſſiſted by Way of *Mandamus*, but be left to his ordinary legal Remedy, by Ejectment or an Action of Treſpaſs.

Anſwer. A *Mandamus to reſtore* is the true Specific Remedy, where a Perſon is wrongfully diſpoſſeſſed of any Office or Function which draws after it Temporal Rights; in all Caſes where the eſtabliſhed Courſe of Law has not provided a *Specific* Remedy by another Form of Proceeding: Which is the Caſe with regard to Rectories and Vicarages.

Here are Lands annexed to this Chapel, which belong to the Chaplain in reſpect of his Function. If the Biſhop had refuſed, without Cauſe, to Licenſe Him, He might have had a *Mandamus* to compel the Ordinary to grant Him a Licenſe. He is now turned out of the Chapel and every Thing belonging thereto, by Force. Such Chapels were not Objects of Attention in the Days when the Regiſter was formed: And therefore there is no particular Remedy provided for *this* Caſe.

It is ſaid "He may bring an Ejectment or an Action of "Treſpaſs." I am not ſure that he could. It don't appear that the *Legal* Property is in *Him:* On the contrary, it is certain that it is *not*. It might originally be in Feoffees. Thoſe Feoffees may not have been regularly continued. It may be impoſſible to find the Heir of the Survivor. If they have been continued, the preſent Feoffees may refuſe to let Mr. *Langley* make Uſe of their Names. *Neither* of theſe Actions, if he could bring them, would be a *Specific* Remedy. In the one, He might recover Damages; In the other, He might recover the Land: But by neither would He be reſtored to his Pulpit, and quieted in the Exerciſe of his Function and Office. We may very well take Notice too, that the Inhabitants refuſe to try the Merits, in an Iſſue. If a *Mandamus* goes, We ſhall ſee what Return they make to it. And this is what ought to be done in the preſent Caſe.

Mr. Juſt. Denison concurred.

Where there is a *temporal* Right, the Court will aſſiſt by Way of *Mandamus*; becauſe it is a *Specific Remedy*.

Rule

* RULE made abſolute (for ‡ granting a *Mandamus.*)

No Return was made: But the Parties agreed to try the Merits in a feigned Iſſue; which was accordingly tried.

Note—Upon this Caſe being † afterwards mentioned, The COURT took Occaſion to ſay "that they had reconſi- "dered the Point, and weighed all the Principles and "Authorities applicable to it; and were fully ſatisfied "that the propereſt and moſt effectual Method of try- "ing the Right to officiate in ſuch Chapels, whether "it depended upon Nomination or Election, was "by *Mandamus.*"

* P. 1046.
‡ *V. poſt*, *pa.* 1265. *Rex* v. *Barker et al'* S.P. *accord'*.
† *V. Rex* v. *Barker et al.* H. 1762 2 *G.* 3. *poſt. pa.* 1265.

Doe, ex dimiſſ. Ruſt, *verſ.* Roe.

In Ejectment—

MR. *Norton* ſhewed Cauſe why the Tenants in Poſſeſſion ſhould not have leave to plead "That the *Lands* "ſpecified in the Declaration are *holden in* ANCIENT DE- "MESNE."

He admitted, that ſuch a Plea might be received, in * this Action (of Ejectment,) with LEAVE of the Court and upon a proper AFFIDAVIT: But He objected to the *Sufficiency* of the preſent *Affidavit*; becauſe it only alledges "That "the LANDS in Queſtion are holden in Ancient Demeſne, "and that they are holden of the Manor of *Godmancheſter*;" but does not go on to alledge "that the MANOR of *God-* "*mancheſter* is *(itſelf) holden in Ancient Demeſne*," as it ought to do.) In the Caſe of *Denn* v. *Fenn*, *Trin.* 24 *G.* 2. *B. R.* the Affidavit was "That the Lands were holden of "ſuch a Manor, *which* MANOR was holden in Ancient "Demeſne."

* See *Alden's* Caſe, 5 *Co.* 105. *accord'*.

Beſides, this may be *only a* TERM, in the Leſſor of the Plaintiff: And if ſo, he cannot ſue *there*; For the Writ of Right Cloſe will only lie, where the Demandant has a *Fee* or a *Freehold.*

Mr. *Gould contra*, in Support of the Rule, cited the Caſe of *Ferrers* v. *Miller*, *P.* 4 *W. & M. B. R.* reported in 1 *Salkeld* 217. *Carthew* 220. * 1 *Shower* 386. and *Caſes in B. R. temp. W.* 3. *Fo.* 21. Where Ancient Demeſne was pleaded in Ejectment: So, in *Lilly's Practical Regiſter*, Title *Abatement*; and in the abovementioned Caſe of *Denn* v. *Fenn.*

* See alſo *Alden's* Caſe, 5 *Co.* 105. and *Smith* v. *Arden*, *Cro. Eliz.* 826. and *Smith* v. *Arden*, 2 *Anderſon* 178. All S. C.

Indeed, *Leave* muſt be aſked of the Court, to plead it: And by 4, 5 *Ann. c.* 16. § 11. It is required, in Caſe of Pleading a Dilatory Plea, "That the Party offering it do "by

* P. 1047. " * by Affidavit prove the Truth of it, or ſhew ſome *probable Cauſe* to the Court to induce them to believe that the " Fact of it is true."

Now this Affidavit does ſhew *probable Cauſe* to induce ſuch Belief. It ſhews " That the *Lands are holden in Ancient Demeſne*; that they are *holden of the Manor of Godmanchester*; and that there is a *Court of Ancient Demeſne* in " the Burrough of *Godmancheſter*, where they might have " proceeded :" Inſtead of which, they have brought their Ejectment in *this* Court.

" Whether theſe Lands are PARCEL *of the ſuperior Manor*," is a Fact triable by a *Jury*: Though the Queſtion " Whether *that ſuperior Manor* be or be not holden in Ancient Demeſne," muſt be tried by *Record*, (by *Dooms-Day Book*.)

Mr. Juſtice FOSTER and Mr. Juſt. WILMOT, the only two Judges at this Time in Court, concurred in Opinion, that there was *not ſufficient Ground* laid for obtaining Leave to plead this Plea.

Mr. Juſt. FOSTER obſerved, that as it was agreed to be neceſſary to *aſk the Leave* of the Court to plead this Plea to a Declaration in Ejectment, it follows of Courſe, that it muſt be in the *Diſcretion* of the Court, either to grant or to refuſe their Leave. And He thought that this Affidavit was *not ſufficient* to ouſt this Court of Juriſdiction. He ſpoke of theſe Courts of Ancient Demeſne, as putting People out of the Protection of the Law, and fitter to be totally * deſtroyed, than to be favoured and aſſiſted.

* *Sed V.* 5 *Co.* 105. *b.* where that Reporter is of a different Sentiment.

Mr. Juſt. WILMOT ſaid it was a ſtrange wild Juriſdiction; where the Jurors are Judges both of Law and of Fact, and ignorant Country Fellows are to determine the niceſt Points of Law: And therefore He was not for granting ſuch Leave, unleſs compelled by Authority. Indeed if the Caſe is brought *ſtrictly within the Rule*, then the Leave *muſt* be granted: We cannot help it.

The Authorities, down from *Alden*'s Caſe to this Time, it is true, are, " That Ancient Demeſne is a good Plea in " Ejectment."

But if You would ouſt this Court of Juriſdiction, You muſt ſhew " that *another* Court *has Juriſdiction*."

Now this Affidavit does not ſhew " *That there are Suitors*, " in the other Court;" nor " that theſe Lands are holden of " a Manor *which Manor* is holden in Ancient Demeſne :" Whereas, if the *Lands* only, and *not the Manor*, are Ancient Demeſne, the Matter can not be tried in the Court of *that Manor*.

The

* The Affidavit ought to have ſhewn "That the Lands * P. 1048.
"are holden of a Manor, *which Manor* is Ancient De-
"meſne:" And ſo was the Affidavit in the Caſe of *Denn* v. *Fenn*; and ſo is the Plea, 1 *Show.* 386. and *Carthew* 220. in the Caſe of *Ferrers* v. *Miller*, S. C.

It can not be tried "Whether the LANDS *themſelves* are "Ancient Demeſne." *Doomſday* will not ſhew *this: Doomſday* will only ſhew Whether the *Manor* is ſo or not. The Form of the Plea makes this as clear as the Sun.

This Affidavit does not therefore purſue the proper Form.

And it ought to be ſhewn that the Leſſor of the Plaintiff has a *Freehold.* How can he ſue *there*, in Ejectment, as *Leſſee of a Term?*

Upon ſuch a ſtrange wild Juriſdiction as this, and upon ſuch an Affidavit, I am not for giving the Defendant Leave to plead this Plea.

RULE DISCHARGED.

Hutchins *verſ.* Kenrick:
Hills et al' *verſ.* Kenrick.

ON ſhewing Cauſe, (upon *Saturday* 21ſt *June*,) in both theſe Cauſes, "Why the Defendant ſhould not be "DISCHARGED *out of the Cuſtody of the Marſhal*, as to "each of theſe Actions, reſpectively," It appeared that the Circumſtances of the two Caſes were a good deal different: *viz.*

In the Cauſe of *Hutchins* v. *Kenrick*, The Defendant was regularly INTITLED *to be ſuperſeded*; Yet was *not actually* ſuperſeded, but REMAINED *in Cuſtody of the Marſhal.* (For although the Order for his being ſuperſeded had become abſolute, two Days *before* the End of a preceding Term, Yet the Defendant had ſtill *continued* in the Cuſtody of the Marſhal, without ever carrying this Order into Execution by getting Himſelf *actually and in Fact* ſuperſeded: And upon the 5th Day of the then next following Term, whilſt the Defendant ſo *remained* actually in Cuſtody, although *intitled* to have been ſo long ago ſuperſeded, a Declaration was delivered to him, at the Suit of HUTCHINS.)

In the other Cauſe wherein HILLS *and Others* were Plaintiffs, the Declaration was delivered to him, whilſt He was regularly and indiſputably in the Cuſtody of the Marſhal, and NOT intitled to be ſuperſeded: But the Objection to this was, "that it was VACATION-*time*, when *this* Declara-
"tion

* P. 1049. " * tion was *delivered*, and likewiſe when the *Bill* (where-
" upon it was grounded) was *filed*."

Note. The *ordinary* modern Practice and Method of charging Defendants in Cuſtody in *Vacation*-time, is by previouſly iſſuing a *Habeas Corpus (ad reſpondendum)* teſted the laſt Day of the preceding Term, and returnable in this Court the firſt Day of the next. This the preſent Practiſers look upon to be a good Foundation for charging a Defendant in Cuſtody, in *Vacation*-time.

And Mr. *Day* (who had been Clerk of the Declarations in the King's Bench Office about 30 Years) certified (*ore tenus*) " That from the Beginning of his Time, *ſome*
" Bills had, all along, been filed with him in Vacation-
" time: But, that (not being clear that this was quite
" regular,) He had always uſed the Precaution of
" marking upon them the exact Time WHEN *he re-*
" *ceived them*."

The Marſhal alſo (upon being aſked,) ſaid that he had found, upon a Search for 5 or 6 Years backward, (but he had looked no further back,) " that *many* Declara-
" tions had been left in *Vacation*-time, for Priſoners in
" Cuſtody."

Note alſo, that there is a Book kept in the King's Bench Office, called the *Marſhal's-Book*; in which are entered the Names of Perſons charged in Cuſtody previouſly to their being ſo charged. But this is a Book of *no Authority*; and only meant for the Marſhal's Convenience, that he may readily ſee what Perſons are charged in Cuſtody: So that it is, (in Truth and Reality,) only a *Memorial* of the Defendant's being charged in Cuſtody of the Marſhal; and *not the Cauſe* or *Foundation* of ſuch Charge and Detainer.

It was agreed, on all Sides, that a *Habeas Corpus to remove from One Court to Another*, was a plain and intelligible Proceeding: But it was very difficult to account either for the Reaſon or the Original or the Validity of this Practice of iſſuing an *Habeas Corpus returnable in the* SAME *Court*; or to diſcover how that Method could anſwer the Purpoſe intended by it.

Mr. *Gould*, who argued on Behalf of the Defendant in both Cauſes, urged, as to the former of them (in which *Hutchins* was Plaintiff,) That the Defendant being regularly INTITLED *to be ſuperſeded* was not in *legal* Cuſtody of the Marſhal; And that no Perſon could be charged as in Coſtody of the Marſhal, who was *not* LAWFULLY SO. He cited the Caſe of *Unwin* v. *Kirchoffe*, 2 *Strange* 1215, Where (upon

* (upon a Motion to ſuperſede the Defendant as not being charged in Execution within two Terms,) it is holden, "That the *Committitur* muſt be actually *entered on Record, before the End* of the *ſecond* Term; And that there "is *no Extenſion* of the Time, to the *Continuance Day* after "Term; Nor was it ſufficient, that there was an *Entry in* "*the Marſhal's Book*, in Time." And Mr. *Gould* laid it down as a Rule, "That a Defendant *once* ſuperſedable is *always* "ſuperſedable. * P. 1050.

As to the latter Cauſe (wherein *Hills* and Others were Plaintiffs.) He cited the Caſe of *Tilſden* v. *Palfriman*, *M.* 3 *Ann. B. R.* reported in 1 *Salk.* 213. and 345. and more largely in 6 *Mod.* 253, 254. Where it is ſaid "That there is "no Way to charge a Defendant in *Cuſtod' Mar'*, in *Vacation*, "but to go to the *Marſhal's Book* in the [King's Bench] Office, "and make an Entry therein, *quod* REMANET *in Cuſtod' "Mar' ad Sectam &c:* And this is SUFFICIENT *to charge* "*him*, provided he be in *actual* Cuſtody; (for if he be out "of Gaol, he may be arreſted.") But this *Entry in the Marſhal's Book*, Mr. *Gould* inſiſted, could be *no ſufficient Foundation* for ſuch a Charge: No more could the modern extraordinary Practice of iſſuing a *Habeas Corpus*. The *Old* Method of charging a Defendant in Cuſtody, both in this Court, and (as appears by 8, 9 *W.* 3. *c.* 27. § 13.) in the Common Pleas too, was by bringing him *into Court*, and *there* charging him when *actually preſent in Court:* Which could not poſſibly be ever done, but *in* TERM-*time*, when the Court was *ſitting*. And this clearly and fully ſhews that the Defendant can *not* be *at all* charged in Cuſtody, *in* VACATION-*time*, when the Court is *not* ſitting.

Mr. *Norton*, who ſhewed Cauſe on behalf of the Plaintiffs in both Cauſes, urged, as to the former (at the Suit of *Hutchins*, (That the *Entry* in the *Marſhal's Book* is right and proper; provided there be (as here was) a *previous Affidavit*, ſworn before the proper Officer, and filed: And ſo is the Practice in the Court of Common Pleas. The Defendant was *found* in the *actual* Cuſtody of the Marſhal; and, conſequently, *could not be arreſted*, (as he might have been, if he had been at large.) And his being INTITLED to be ſuperſeded makes no Difference: For if a Defendant ſtill *continues* in Cuſtody and is actually *found* in Priſon, He is ſubject to be *charged in Cuſtody*, at the Suit of a *third* Perſon. The Rule "that a Defendant *once* ſuperſedable is *always* ſuperſedable," holds *only* with regard to the SAME *Plaintiff*, at *whoſe Suit* he was ſuperſedable: It does *not* extend to a *third Perſon* to *another* Plaintiff.

As to the latter Cauſe, (at the Suit of *Hills* and Others,) Little needs to be ſaid: For if the Defendant is properly in Cuſtody at the Suit of *Hutchins*, theſe other Plaintiffs can

* P. 1051. * ſoon change him *regularly*; (whether their *preſent* Charge will hold, or not.) To be ſure, the *Habeas Corpus* ſeems an odd Method; eſpecially, when the Cuſtody is never altered.

The Statute of 8, 9 *W.* 3. *c.* 27. § 13. only regards the Method of charging Priſoners in Cuſtody in the *Fleet* Priſon; and enacts "That the Delivering a Copy of the Declaration "after filing it, and then giving a Rule to plead &c. and "making Affidavit of the Delivery of the Declaration,) ſhall "intitle the Plaintiff to ſign Judgment, as if the Defendant "had been *actually charged at the Common Pleas or Exche-* "*quer Bar.*"

And there is a *Rule* in the Court of Common Pleas in *H.* 1734. 8 *G.* 2. ſimilar to the Rule of this Court, made in 1742.

THE COURT were extremely clear, in the former Cauſe, wherein *Hutchins* was Plaintiff, That the Defendant was REGULARLY *charged.* For the Plaintiff *found* the Defendant in ACTUAL *Cuſtody*, and had a *Right to charge him in Cuſtody*, without inquiring whether he was *intitled* to be ſuperſeded, or not. IF He could not charge his Debtor *in Cuſtody*, the Debtor would not be amenable to Juſtice *at all:* For the Plaintiff could not *arreſt* him, not being at large; nor could have any *other* Way of coming at him. The Rule of a Defendant's being "*always* ſuperſedable, after he is "once ſo," holds *only* between the *Parties themſelves*, the Plaintiff and Defendant in *that* Cauſe: It does not extend to *Other* Perſons, to Plaintiffs in *other* Cauſes.

And Mr. Juſt. FOSTER added That He had known, (in Experience,) of Defendants remaining *many Terms* in Cuſtody, *after* they were intitled to be ſuperſeded.

As to the latter Cauſe, wherein *Hills* and Others were Plaintiffs, and the Charge was in VACATION-*time*—

THE COURT were All of Opinion that there ought to be *ſome* Method of charging a Priſoner in Cuſtody, *in Vacation-time:* Becauſe, not being at large, he can not be arreſted; and ſo his being in Cuſtody would be an *Aſylum* during the whole Vacation.

But *what* this Method ſhould be, was not ſo clear, and deſerved (they ſaid) a good deal of Conſideration. The *Habeas Corpus* they All looked upon to be a *ſtrange* Method: And they agreed that the cheapeſt and eaſieſt Way would be the *beſt.*

Mr. Juſt. DENISON was explicit, "That, by the Practice "of *this* Court, No Declaration can be delivered to a Priſo- "ner in Cuſtody in THIS *Court*, *but* in TERM *time.*" In Proof of which, He cited a Caſe in Point; *P.* 17 *G.* 2. *B. R. Hollo-*

* ‡ *Holloway* v. *Croſs*: Where it was holden "That every "Declaration againſt a Priſoner in Cuſtody of the Marſhal "muſt be delivered *in* TERM-*time*: For Priſoners are con- "ſidered in the ſame Light with Attornies (who are ſuppoſed "to be always preſent in Court;) againſt Whom, Bills can "not be filed, *but* in *Term*-time." And *this* was ‡ agreed; though the Point was *determined* upon ‡ another Queſtion.

* P. 1052.

‡ Note—— The whole Court there agreed, (and the Officers had certified 'That the Delivery of the Declaration was *Irregular*, as being delivered in *Vacation*-time:' But All the Court, except Mr. Juſtice *Wright*, thought "That the Defendant had, by craving Oyer of the Bond, *waved this Irregularity*;" And upon *that* foot diſcharged the Rule to ſhew Cauſe Why there ſhould not iſſue a *Superſedeas*.

He added, That *formerly* the Defendant (when in Cuſtody was brought up *into Court*, *by* RULE, in Order to be charged: There was no Occaſion for a *Habeas Corpus*, when it was in the *ſame* Court. And He cited *Lilly's Practical Regiſter*, Title *Priſon and Priſoner*, *per Roll* Ch. Juſt. accordingly.

And this Practice of bringing up the Priſoner *into Court*, ſtill remains in the *Counties Palatine*.

The *Modern* Practice of delivering Declarations to Defendants in Cuſtody, takes its Riſe from this *Old* One of *actually* bringing them *into Court*, in *Term* Time, and *there* charging them: Which muſt ſtill, in Point of Law, be *ſuppoſed* to be done; and which can not be done but *in* TERM-*time*.

Per Cur. In *Hutchins* v. *Kenrick*, The Rule to ſhew Cauſe "why the Defendant ſhould not be diſcharged out of "the Cuſtody of the Marſhal, as to *this* Action," was diſcharged, (the Cauſe ſhewn being holden clearly to be ſufficient.)

In *Hills et al'* v. *Kenrick*, The Matter was Ordered to ſtand over till the laſt Day of this Term, (in order to have the Practice ſettled.)

And accordingly,

Lord MANSFIELD now delivered the Reſolution the Court had come to: Which was to the following Effect.

We have conſidered of the Practice of this Court, and of that of the Common Pleas: And We are of Opinion that the right Method is (like that which is taken in the Common Pleas) To *file a* BILL *as of the* PRECEDING *Term*; and then to deliver to or leave for the Defendant, being in Cuſtody, a *Copy of the Declaration* as of the *preceding* Term; and to make an *Affidavit* thereof. We think this to be the right Method for the Purpoſe of charging ſuch a Defendant with a *new* Suit; and that it ought to be uſed in this Court for the future: And We think there is *No* Occaſion for a HABEAS CORPUS.

The End of *Trinity* Term 1760.

* Michaelmas Term

1 Geo. 3. B. R. 1760.

Friday 7th *November* 1760.

Rex *verſ.* Occupiers of St. Luke's Hoſpital.

ON *Monday* 29th of *January* 1759, Mr. *Williams* moved to quaſh an Order made by the Juſtices of Peace for the County of *Middleſex*, at their Quarter Seſſions at *Hicks's Hall*, confirming an Aſſeſſment or Rate for the Relief of the Poor, made upon One *Joſeph Mansfield*, and charging him as OCCUPIER *of St. Luke's Hoſpital*; Being of Opinion, upon Conſideration of the Circumſtances therein ſet forth, " That the ſaid *Joſeph Mansfield* is the *Occupier* " of the ſaid Hoſpital:" Whereas in Fact, He was (as Mr. *Williams* alledged) *only a Servant* there. He cited 2 *Strange* 745. *Rex* v. *Inhabitants of St. Thomas's in Southwark*; where a *Preacher* at a Meeting Houſe was holden *not* to be rateable as an Occupier.

A Rule was thereupon made, to ſhew Cauſe. And on *Tueſday* 8th *May* 1759, Mr. *Gould* moved to make that Rule abſolute; inſiſting upon two Objections to the Validity of the Rate; *viz.* 1ſt. " That this Man is only a SERVANT;" and therefore could not be " rated as *Occupier*:"

2d. " That this HOSPITAL is *not rateable at all*."

Mr. *Norton*, (who was for the Rate,) agreed that, ſtrictly ſpeaking, it could not well be ſupported " that a *Servant* " was rateable As OCCUPIER:" But He offered to defend it upon the *Merits*; *viz.* Whether this *new erected charitable Hoſpital for Lunatics*, be or be not *rateable*.

And if the other Side would not agree to that, He ſaid He muſt object to the *Certiorari*, as having *irregularly iſſued*; *viz. not till after* the Six Months were expired; (it being more than nine Months from the 2d of *February* to *Michaelmas* Term.)

And

* And accordingly, a Rule was then made to ſhew Cauſe "Why the *Certiorari* ſhould not be quaſhed." But afterwards, * P. 1054.

On *Wedneſday* 16th *May* 1759, It was Ordered, by *Conſent* of Counſel on both Sides, "That the Orders returned "with the *Certiorari* in the Cauſe of the *King* againſt *Joſeph* "*Mansfield* (who then ſtood charged as Occupier of this "Hoſpital) ſhould be ſent back to be RE-*ſtated*." In Conſequence of which Rule by Conſent, The following *re-ſtated* Order was afterwards ſent up, as the Return to the ſaid Writ: *viz.*

Note—The *Re-ſtated* Order was under the *like Caption (verbatim)* with the old One.

A *Complaint* and *Appeal* being made unto this Court, againſt a certain Article contained in the Rate or Aſſeſſment made on the 19th Day of *July* in the Year of our Lord 1757, for Relief of the Poor of the Pariſh of *St. Luke* in the ſaid County, which Article is as follows, *viz.*—"The OCCUPIERS of a Meſſuage or Tenement and Premiſſes called *Saint Luke's Hoſpital for Lunatics:* Rent 80*l.* Rate 2*l.* 13*s.* 4*d.*" By which Article, the ſaid Meſſuage called *Saint Luke's Hoſpital for Lunatics* is valued after the Rate of 80*l.* *by the Year*, and aſſeſſed (accordingly) to pay 2*l.* 13*s.* 4*d.* *by the Quarter* of a Year; *And this* COURT having fully heard and examined the ſaid Complaint and Appeal, *It appears* in Evidence unto this Court, That by Indenture made the 21ſt Day of *November* in the Year of our Lord 1750, Between the Mayor Commonalty and Citizens of the City of *London* of the One Part, and *James Sperling* of *Mincing Lane* in the Pariſh of *St. Dunſtan in the Eaſt London* Merchant, *Henry Banks* of the Pariſh of *St. Mary Hill* Citizen and Grocer of *London*, *Richard Speed* of *Old Fiſh Street* in the Pariſh of *St. Mary Magdalen London* Druggiſt, *Thomas Light* of *Mincing Lane* aforeſaid in the ſaid Pariſh of *St. Dunſtan in the Eaſt* Merchant, and *William Prowting* of *Tower Street* in the ſaid Pariſh of *St. Dunſtan in the Eaſt* Apothecary, of the other Part, The ſaid Mayor Commonalty and Citizens, as well for and in Conſideration of the Sum of 100*l.* of lawful Money of *Great Britain* already paid to Sir *John Boſworth* Knt. Chamberlain of *London* to and for the Public Uſes of the ſaid Mayor Commonalty and Citizens, as alſo for and in Conſideration that they the ſaid *James Sperling*, *Henry Bankes*, *Richard Speed*, *Thomas Light* and *William Prowting*, ſhould and would *build* or *convert* the *Premiſſes* in the ſaid Indenture mentioned or ſome Part thereof into an HOSPITAL *for* LUNATICS; And for and in Conſideration of the Rents and Covenants in the ſaid Indenture contained on the Part and Behalf of the ſaid *James Sperling*, *H. B. R. S. T. L.* and *W. P.* their Executors Adminiſtrators and Aſſigns to be paid and performed, and for divers other good Cauſes and Conſiderations them the ſaid Mayor and Commonalty and Citizens eſpecially moving, *Did*, purſuant to an Order of the Court of

* P. 1055. * of Common Council made the 15th Day of *November* then next preceding, demiſe grant and to Farm let unto the ſaid *J. S. H. B. R. S. T. L.* and *W. P.* their Executors Adminiſtrators and Aſſigns, ALL that Piece or Parcel of *Ground*, with the *Buildings thereupon erected*, ſituate and being on *Windmill-hill* in the Pariſh of *St. Luke* in the County of *Middleſex*, containing from Weſt to Eaſt, on the South Side fronting the *Upper Moorfields*, 180 Feet of Aſſize (little more or leſs,) and from South to North on the Eaſt Side, 178 Feet of Aſſiſe (little more or leſs,) and from Eaſt to Weſt on the North Side, 165 Feet of Aſſize (little more or leſs,) And from North to South on the Weſt Side, 180 Feet 2 Inches of Aſſize (little more or leſs) and abutting on the Way leading to *St. Agnes le Clair*; All which ſaid Premiſſes were formerly demiſed, by two ſeparate Leaſes, to *Philip Whiteman* and *John Davis*, and do more fully appear by a Scheme or Draft thereof, with a Scale made to the ſame, unto the ſaid Indenture annexed: *To have and to hold* the ſaid Piece or Parcel of *Ground* with the Appurtenances, unto the ſaid *J. S. H. B. R. S. T. L.* and *W. P.* their Executors Adminiſtrators and Aſſigns, from the Feaſt Day of the Birth of our Lord Chriſt next enſuing the Date of the ſame Indenture, for and during and unto the full End and Term of 32 Years from thence next enſuing and fully to be complete and ended; *Yielding and paying* therefore yearly and every Year during the ſaid Term, unto the ſaid Mayor and Commonalty and Citizens, in the Office of Receipts and Payments of Money of the ſaid Chamberlain of the ſaid City for the Time being, the Rent or Sum of *Ten Pounds* of lawful Money of *Great Britain*, on the Four moſt uſual Feaſts or Terms in the Year, that is to ſay, the Feaſt of the Annunciation of the Bleſſed Virgin *Mary*, the Nativity of St. *John* the Baptiſt, St. *Michael* the Archangel, and the Birth of our Lord Chriſt, by even and equal Portions, without making any Deduction Defalcation or Abatement for or by reaſon of any Taxes Rates or Aſſeſſments impoſed or to be impoſed during the Term aforeſaid upon the Premiſſes hereby demiſed or any Part thereof, by any Act or Acts of Parliament or otherwiſe howſoever; the firſt Payment thereof to begin and to be made on the Feaſt of the Annunciation of the Bleſſed Virgin *Mary* next enſuing the Date of the ſame Indenture; And that it was amongſt other Things *covenanted and agreed* by the ſaid Indenture and between the ſaid Parties thereto, that they the ſaid *J. S. H. B. R. S. T. L* and *W. P.* their Executors Adminiſtrators or Aſſigns or ſome of them ſhould and would *build* or *convert* the Premiſſes thereby demiſed or ſome Part thereof into an HOSPITAL *for poor* LUNATICS, and employ the ſame to no other Uſe Intent or Purpoſe whatſoever during the ſaid Term: And that among other Things in the ſaid Indenture, are contained two Clauſes and Proviſoes in the following Terms, " *Provided* always that if the ſaid

" yearly

* " yearly Rent of 10*l.* be behind and unpaid in part or in * P. 1056.
" all by the Space of fourteen Days next after any of the
" ſaid Days of Payment on which the ſame ought to be paid
" as aforeſaid, being lawfully demanded at the Place of Pay-
" ment aforeſaid, Or if the ſaid *J. S. H. B. R. S. T. L.* and
" *W. P.* their Executors Adminiſtrators and Aſſigns do not
" well and truly perform and keep all and ſingular the Co-
" venants herein contained on his and their Parts to be per-
" formed and kept, that then and at all Times afterwards it
" ſhall and may be lawful to and for the ſaid Mayor and
" Commonalty and Citizens or their Aſſigns into all or any
" Part of the ſaid demiſed Premiſſes in the Name of the
" Whole wholly to *re-enter*, and the ſame to have again re-
" tain and re-poſſeſs in their former Eſtate, and the ſaid *J. S.*
" *H. B. R. S. T. L.* and *W. P.* their Executors Adminiſtrators
" and Aſſigns and all other Occupiers of the Premiſſes there-
" out and from thence utterly to expel put out and amove,
" theſe Preſents or any Thing therein contained to the con-
" trary notwithſtanding: *Provided* alſo, And theſe Preſents
" are upon this *Condition*, that if the ſaid *J. S. H. B. R. S.*
" *T. L.* and *W. P.* their Executors Adminiſtrators or Aſſigns
" or any of them do or ſhall at any Time or Times hereafter
" during the ſaid Term *convert the ſaid Premiſſes to any* O-
" THER *Uſe than that of the charitable Deſign of poor Luna-*
" *tics*, then theſe Preſents and every Thing herein contained
" ſhall ceaſe determine and be utterly *void:* any Thing here-
" in contained to the Contrary thereof in any wiſe notwith-
" ſtanding."

It appears likewiſe in Evidence unto this Court, that BE-FORE *the Erecting* the ſaid Hoſpital, Divers, to wit, 29 HOUSES *were ſituate* UPON *the* LAND *and* PREMISSES in and by the ſaid Indenture contained and demiſed; And that in the ſeveral Rates made by the Overſeers of the Poor for the Relief of the Poor within the ſaid Pariſh of *St. Luke*, for in and during the ſeveral Years between the Year of our Lord 1744 and the Date of the Indenture herein before mentioned, *the ſaid* 29 HOUSES *were valued and eſtimated at the annual Value of* 196*l. by the Year:* And that in the Year of our Lord 1745, the SAID 29 HOUSES being aſſeſſed in the Rate made in the *ſaid Year* for the Relief of the Poor within the ſaid Pariſh of *St. Luke*, after the Rate and Proportion of THREE SHILLINGS *in the Pound Sterling*, did yet *pay and yield* NO MORE to the ſaid Overſeers in Satisfaction of the ſaid Rate and towards the Relief of the Poor, than *Ten Pounds and One Shilling*; And that in the Year of our Lord 1746, the ſaid 29 HOUSES being aſſeſſed in the Rate made by the Overſeers of the Poor of the ſaid Pariſh of *St. Luke* in the ſaid laſt mentioned Year for the Relief of the Poor within the ſaid Pariſh after the Rate and Proportion of THREE *Shillings* in the Pound Sterling, did yet pay and yield *no more* to the ſaid Overſeers in Satisfaction of the ſaid Rate and towards the Relief of the Poor, than 8*l.* 11*s.* And that in the

*P. 1057. * the Year of our Lord 1747, the ſaid 29 HOUSES being aſſeſſed in the Rate made in the ſaid laſt mentioned Year for the Relief of the Poor within the ſaid Pariſh of *St. Luke* after the Rate and Proportion of 3*s.* 3*d.* *in the Pound Sterling*, did yet pay and yield *no more* to the ſaid Overſeers in Satisfaction of the ſaid Rate and towards the Relief of the Poor, than 8*l.* 14*s.* 9*d.* And that in the Year of our Lord 1748, the ſaid 29 HOUSES being aſſeſſed [*ut ſupra*] after the Rate and Proportion of 3*s.* in the Pound Sterling, did yet [*ut ſupra*] *no more* than 7*l.* 1*s.* And that in the Year of our Lord 1746, the ſaid 29 HOUSES being &c, after the Rate and Proportion of 3*s.* &c. *no more* &c. than 6*l.* 3*s.* And that in &c 1750, the ſaid 29 HOUSES being aſſeſſed [*ut ſupra*] after &c of 2*s.* 9*d.* in the Pound Sterling, did yet &c no more &c. than 2*l.* 8*s.* 9*d.*

It appears alſo in Evidence to this Court That the Premiſſes demiſed *were accordingly built and converted into the* HOSPITAL *mentioned in the ſaid Article of the Rate in queſtion*, called, "*St. Luke's Hoſpital for Lunatics*," for the affording a *charitable* and *free* Suſtentation and Cure to poor and helpleſs Lunatics; And that EVERY *Apartment and Parcel* of the ſaid Premiſſes ſo built and converted into ſuch Hoſpital as aforeſaid, is laid out and applied, either in WARDS or CELLS for the Lodging of ſuch Lunatics as aforeſaid, or in OFFICES neceſſary for their Suſtentation and Cure, or in APARTMENTS neceſſary for Perſons who are *hired* from Time to Time to *attend on ſuch Lunatics* for their better Suſtentation and Cure, and in NO OTHER *Apartments or Buildings whatſoever*; And that the *ſaid Edifice* was *originally erected*, and *ſtill is ſupported*, and *very many poor and helpleſs Lunatics* continually have been and ſtill are *ſuſtained and taken Care of therein*, And the *menial Servants attending upon ſuch Lunatics* have been and ſtill are *hired and paid*. And *all other Expences* relating to and neceſſary for the maintaining the ſaid Hoſpital and Charity have been and ſtill are from Time to Time *defrayed and borne*, by the FREE AND VOLUNTARY CONTRIBUTION of divers Perſons; Out of whom, a COMMITTEE annually is appointed, who meet WEEKLY, to order the Admiſſion and Diſcharge of Patients, the hiring and retaining Servants, the Payment of Bills, and the Regulation of all other Matters relative to the Maintenance and Upholding of this *Charity*; and that NONE BUT ſuch poor and helpleſs *Lunatics*, and the *Perſons neceſſarily attending upon them*, have *any kind of* DWELLING *or* OCCUPATION in the ſaid Hoſpital; And that One *Joſeph Mansfield* (the Appellant) is the PRINCIPAL *Perſon hired* from Year to Year by the ſaid Committee of Contributors, and *receiving certain Wages*, and *living in the ſaid Hoſpital for the Purpoſes of attending on the ſaid Lunatics*, and having NO OTHER *Abode Occupation or Eſtabliſhment therein*; And that the ſaid *James Sperling*, *Henry Bankes*, *Richard Speed*, *Thomas Light* and *William*

* *William Prowting* or any of them, their or any of their Executors Adminiſtrators or Aſſigns, *have not* nor *ever had* or *can have* any *Profit Benefit* or Advantage from the ſaid Premiſes or any Part thereof, nor any *Poſſeſſion* or *Occupation* thereof, otherwiſe than as aforeſaid. * P. 1058.

The COURT [The General Seſſion at *Hicks's Hall*,] upon Conſideration of the Circumſtances above ſet forth, is of Opinion, "That the ſaid Tenement called *St. Luke's Hoſpital* OUGHT *to be aſſeſſed and rated* towards the Relief of "the Poor, by the ſaid Rate;" and doth accordingly DISMISS *the ſaid Appeal*, and CONFIRM *the ſaid Rate.*

By the Court.

WALLER.

Mr. *Gould*, Mr. *Thurlow*, and Mr. *Lane*, on Behalf of *St. Luke's Hoſpital*, moved (on *Monday 23d June* 1760,) to quaſh this *reſtated* Order of Seſſions thus again *confirming* the ſaid Rates.

They argued, 1ſt. That this BUILDING itſelf, (an Hoſpital ſupported by voluntary charitable Contributions) was *not rateable* towards the Support of the Poor; And 2dly. That *no particular Perſon* whoſoever was chargeable as OCCUPIER of it.

Firſt—This is only a *mere* BUILDING, a Houſe ſupported by private free and voluntary charitable pecuniary Contributions; and *uſed only as an* HOSPITAL for the Suſtentation and Cure of poor and helpleſs Lunatics: It has *no Apartments* in it, nor any *Accommodations* for the *Reſidence* of any Perſons whatſoever, except the Patients and the hired Servants neceſſarily attending them. It is *not endowed* with any *Land*; nor has it any *Land about it*, being the mere *Site of the Houſe* itſelf. Therefore it can not poſſibly be included within the Intention of the Dictum of Ld. Ch. J. *Holt*, mentioned in a Scrap of an anonymous Caſe in 2 *Salk.* 527. "That *Hoſpital*-"LANDS are chargeable to the Poor, as well as other *Lands*: "For no Man, by appropriating his *Lands* to an Hoſpital, "can diſcharge or exempt them from Taxes to which they "were ſubject before, and throw a greater Burthen upon their "Neighbours." For He there plainly means Lands *leaſed out* to Tenants and bringing in an *annual Profit*: Which is, by no means, the preſent Caſe. This is *no beneficial* Leaſe: The Leſſees receive *no Profit* by it; Nor *can* they, by the * Proviſo in their Leaſe, put it to any *other Uſe* than that of the charitable Deſign of poor Lunatics. *V. ante, pa. 106.

The Statute of 43 *Eliz. c.* 2. § 14, 15. directs "That a *Pro-*"*portion of the Money* to be raiſed by virtue of that Act, ſhall "be ſent for the *Relief of Hoſpitals* in the reſpective Counties." And it would be abſurd to ſuppoſe, that that *ſame* Statute intended to *tax* Hoſpitals towards the *Relief* of Hoſpitals.

* P. 1059. * In 2 *Bulſtr.* 354. the Judges *(Hutton* and *Croke)* put the Matter of taxing One or the Other of the Perſons there in Queſtion, upon the Foot of the *Profit* or *Advantage* received by them. But theſe Leſſees receive no Sort of Profit or Advantage, nor can poſſibly receive any, under *this* Leaſe.

And nothing is ſubject to be rated towards the Relief of the Poor, but a *beneficial* Intereſt. There is *no Inſtance* of an *Hoſpital* having ever been rated, as to *ſuch Part* of it as is *only applied to charitable Uſes*; Whatever may have been done, as to thoſe large and fine Apartments in the great Hoſpitals, wherein the *Officers* (who are Gentlemen of Fortune and Faſhion) reſide with all their *Families*, and uſe them as their Dwelling-houſes.

Secondly—No particular Perſon whoſoever can be charged as OCCUPIER of this Houſe of mere Charity.

By the 43 *Eliz. c.* 2. § 1. The Taxation is to be upon every *Occupier* of Lands, Houſes, Tithes, Coal-mines, or Sale-Underwoods in the Pariſh.

But None of the Perſons mentioned in this Order are OCCUPIERS of this Houſe, *within the Meaning and Intention* of the Makers of this Act. They have no Poſſeſſion or Enjoyment of any *lucrative* or *profitable* Tenement. Therefore there is no Rule or Medium or Proportion whereby to rate them: For if they were rateable at all, it muſt be in Proportion with Others. But theſe Perſons receive *no* Profit or Emolument at all: And there can be no Proportion to *Nothing*. Therefore they are not rateable at all.

For the ſame Reaſon, No Perſon can be rated as an Occupier of a Church, a Meeting-houſe, or an Alms-houſe.

*V. 2 Strange 745. * In *H.* 13 *G.* 1. in this Court, One *Read* was charged to the Poors Rate in reſpect of his being an *Occupier* of a *Meeting-houſe* where he preached: and He was holden *not* to be liable; Becauſe, as a Preacher, he is no more chargeable as an Occupier, than any of his Audience. And the Court there took Notice, that it was not ſtated "That he *let out* "Pews;" ſo as to make him a Perſon that occupies, and receives a *Profit* from it.

So, in the preſent Caſe, No one can be charged as *Occupier*; becauſe No One receives any lucrative *Profit*.

And this Circumſtance makes it widely different from the Caſe of *Eyre* v. *Smallpace et al'*, *P.* 1750. 23 *G.* 2. *B. R.* Where the Queſtion was "Whether the Plaintiff, being "*Control-*

* " *Controller of Chelſea College*, and reſiding in the Control- * P. 1060.
" ler's Apartments there, was aſſeſſable towards the Main-
" tenance of the Poor of the Pariſh of *Chelſea*, for the *Apart-*
" *ments* which he occupied there by virtue of his ſaid Office:"
And the Court held him to be *chargeable*, as *Occupier*; grounding their Opinion upon a then recent and unanimous Opinion of all the Judges, upon a like Queſtion, in the Caſe of *Greenwich* Hoſpital, concerning the Payment of the Window-Tax; in which Caſe, all the Twelve Judges unanimouſly held, " That the Act of Parliament relating to the " Window-Tax *did* extend to the *Apartments of Officers* in " *Greenwich* Hoſpital;" which Caſe of *Greenwich*-Hoſpital They thought not diſtinguiſhable from that of *Chelſea*-Hoſpital then in Judgment before them.

But that was an Hoſpital of *Royal Foundation*, and the *King's own Houſe*. The Officers have *large noble Apartments* there, with *diſtinct Doors*: They reſide in them with their *Families*, and live diſtinctly in them, at their ſeparate Expences. Thoſe Apartments are ſubſtantially their Houſe, their Domicil. In *this* Hoſpital, there are only Cells for the Lunatics, and a bare Lodging for thoſe who neceſſarily attend them, and are always about their Perſons.

On 6th *November* 1760,
Mr. *Norton* and Mr. *Stowe* argued in Support of the Order.

They inſiſted, 1ſt. That this Building was *rateable*; and 2dly. That the Charge is *ſufficiently* laid upon it, although no *particular Occupier* be perſonally and ſpecifically named.

Firſt—*Hoſpital-Lands* are rateable to the Relief of the Poor of the Pariſh wherein they lie, as well as other Lands are: This appears from 2 *Salk.* 527. And this Charity is only a *voluntary* Act of *private* Perſons, Proprietors of this Building: Which private Perſons, have it not in their *Power*, by applying it to the Uſe of a Charity, to *diſcharge* it of legal Rates and Payments duly charged upon it for the Relief of the Pariſh; and thereby to take away this Relief from the Pariſh. And it would be moſt unreaſonable that this Property which was always rateable before, ſhould, merely by the *voluntary Act of the Proprietor*, be rendered unrateable; when, by that very Act, the Proprietor introduces many Servants into this Building, who will gain Settlements in the Pariſh by their Service performed therein: So that theſe Gentlemen would *load the Pariſh* with Poor, and yet *exempt themſelves* from paying any Thing towards its Relief. Therefore the Pariſh are *ſtill intitled to their Rates*; whether the Proprietors makes a *beneficial* Intereſt of it, or chooſe to apply it to the Purpoſes of a *Charity*.

And

* P.1061. * And there are many *Inſtances* of Hoſpitals and charitable Foundations being *in Fact rated* to the Relief of the Pariſhes wherein they are ſituated: Particularly, The *Britiſh* Lying-in Hoſpital, in *St. Giles's*; An Hoſpital in *St. Botolph's Alderſgate*; Another in *St. James's Clerkenwell*; (which laſt never, till, now, refuſed to pay.) And this very Hoſpital pays the *Land*-tax, and alſo the *four Rates* (*viz.* Scavengers, Lights, *&c.*)

And the Caſes of *Window-Lights* are not unlike to the preſent Caſe.

The *Foundling Hoſpital* pays the *Window-tax*; as appears by the Tax-Book (*Fo.* 48;) And all the Judges, (upon the Queſtion being referred to them,) were of Opinion, "That they *ought* to do ſo."

So, *St. Bartholomew's Hoſpital* was an Inſtance where the *Officers* were aſſeſſed for their Apartments: And on 7th *June* 1748, All the Judges held them rateable. So alſo in the Caſe of *Chriſt's* Hoſpital (at the ſame Time,) and of *St. Bride's* and *St. Thomas's*, the general Point determined was "That the Officers are chargeable to the *Window-Lights*."

In the Caſe of the *French Hoſpital* in *St. Luke's*, The Judges held it not to be aſſeſſable, as to the *Lunatics* maintained therein: But they gave no Opinion as to the Charge upon One *Romier* (who was perſonally aſſeſſed,) becauſe it did not appear to them, Whether he did or did not *live* in it.

In the Caſe of *Sutton's* Hoſpital, where Some of the Officers have their Apartments intermixed with the Rooms of the Perſons ſupported by that Charity, The Commiſſioners thought "That none of the Inhabitants of thoſe *intermixed* "Rooms were chargeable, (neither the Officers, nor the poor "Men;)" And the Judges confirmed that Opinion of the Commiſſioners.

In the preſent Caſe, the *five Leſſees* may be conſidered as Occupiers by their Servants, who are under their Control; And they are properly chargeable as ſuch: The *Patients* indeed neither are nor ought to be rated.

They concluded this Head, with obſerving "That the 43 "*Eliz. c.* 2. is a beneficial Law made for the Benefit of the "Poor of the Pariſhes."

Secondly—

* Secondly—As to the not charging any *particular* Perſon, as Occupier— * P. 1062.

They inſiſted that it was *not neceſſary* that any particular Perſon ſhould be *ſpecifically* rated as Occupier.

They cited a Caſe, from 8 *Mod. Pa.* 38. *Rex* v. *Inhabitants* * *of Brickhill*, *P.* 7. *G.* 1. *B. R.* where a Man who had been rated by the Name of "*The Occupier of Roſcoe's Tene-*"*ment*," and not by his own proper Name, and had paid the ſaid Rates under ſuch Aſſeſſment, was holden to have gained a Settlement under this general Rate.

* This Caſe really was *Rex* v. *Inhabitants of Brightmen* (in *Lancaſhire*) *P.* 8 *G.* 1. 1722. The Point was indeed determined as is mentioned in 8 *Mod.* 38: (though the Names Perſons and Places are there miſtaken.) But the Man had actually *paid* the Rate no leſs than *eleven Years*, under this Aſſeſſment, which deſcribed Him without ſpecifying his Name, *viz.* calling Him only "the Occupier of *Hoſcoe's* Tenement."

They alſo urged the Caſe in 2 *Salk.* 527 *P.* 1 *Ann. Anonymous*: Which they ſaid, was probably the ſame Caſe with a Caſe of *Rex* v *Staines*, † relating to the Pariſhes of *Ilford* and *Eaſt Ham*. And they ſaid they had a Certificate "that "the Pariſhes of *Ilford* and *Eaſt-Ham do* now pay."

† *Rex* v. *Staines* was *H.* 13. *W.* 3. *William Staines* was taxed to thoſe two Pariſhes, for the Concerns of an Hoſpital in them. The Seſſions, upon Appeal diſcharged the original Order as being founded upon Miſinformation and Surprize.

Mr. *Gould* and Mr. *Lane*, who had made the Objections to the Order, replied—

1ſt. That the Caſes and Inſtances cited by the Counſel on the other Side proved Nothing to the preſent Point: for they went no further than the Caſe of *Chelſea*-Hoſpital, *Eyre* v. *Smallpace et al'*, *P.* 1750. 23. *G.* 2. *B. R.* where it was ſettled "That all Apartments of Officers, *uſed as Dwelling-*"*Houſes*, are liable to be taxed to the Window Lights, *as* "Dwelling-Houſes." And the Window Light Acts are poſitive and affirmative, "That *all Dwelling-Houſes* ſhall pay "to that Tax." The Officers have a *Benefit* from their *Apartments*. But *here* could ariſe *no* Benefit at all, to *any* Perſon whatſoever: Therefore *No One* could be taxable to the Relief of the Poor.

And as to their loading the Pariſh by introducing Servants who would gain Settlements by their Service in the Hoſpital, They denied that theſe Servants would gain a Settlement by ſuch Service.

2dly. The Caſe of *Brickhill*, being cited from a Book of no Authority, deſerves no Anſwer. Beſides, in that Caſe, the Man had long acquieſced under the Order, and paid the Tax.

THE

* P. 1063. * The Court did not give any Opinion Yesterday; But "inclined That the Occupier ought to be particularly specified;" And "also, that the Whole turns upon "the *Person or Persons who* ought to be rated."

Indeed, if a Person rated generally by the Appellation of Occupier of such Tenements, acquiesces, and takes the Charge upon him, and pays it; It would be unreasonable that he should be excluded from gaining a Settlement, if He afterwards has Occasion to claim it. But *that* is not this Case.

The Instances of the several Hospitals mentioned by the Counsel for supporting the Order, carry the Matter no further than the Case of *Chelsea* Hospital has settled it: And the Judges have unanimously determined, "That all Apart-"ments of Officers in Hospitals, which are *used* as *Dwel-*"*ling-houses* ought to be taxed to the Window-Lights, as "Dwelling-houses."

However, They said they would consider of it, and then declare their Opinion. Cur. advis.

Lord Mansfield now delivered the Opinion of the Court; (having first stated the Order, and the Objections taken to it.)

Cases of this kind depend upon the particular Nature of the respective Hospitals: Each stands upon its own distinct Circumstances. Therefore no *General* Consequences will arise from the Determination of this particular Case.

The *Land*-Tax differs from the *Poors*-Tax. The *Landlord* who receives the Rent, is to pay the Land-Tax: But the *Poors*-Tax is payable by the *Occupiers*. Therefore the Rating Hospital *Lands* to the *Land*-Tax is not applicable to the present Question.

The *Occupier* ought to be rated, regularly, by *Name*. But in the present Case, it is *more* than a mere Defect in *Form*: The Fault in form here arises from the *Essence* of the thing. For if they can not fix upon some particular Person who may properly be rated as Occupier of this Building. It follows, as a necessary Consequence, "That *no* Rate can *at* "*all* be made upon it."

As to the Argument that has been urged in Support of the Order, "That a Proprietor of Lands or Houses can "not, by his own private voluntary Act, discharge such his "Property, from Payments legally due to other Persons "upon and out of it"—It does *not* hold true in *Fact*. For this

* this Rate payable to the Pariſh, as well as ſeveral other Payments ariſing from Property and chargeable upon it, *do* and *muſt* depend upon the *Will of the Proprietor*. The Owner of a Houſe may, if he pleaſes, pull it quite down, and convert it into a Toft. The Owner of Lands may, if he pleaſes, ſuffer them to lie barren and unoccupied. Tithes and the Right of them vary, according to the different Species of the Produce of the Land: Yet the Land-holder may ſow it, or plant it, or uſe it in the Manner he likes beſt; or even not at all, if he ſo chooſes. * P. 1064.

The *material* Queſtion in this Caſe is "WHO can be "named and charged as the *Occupier*."

There are only *three* Sorts of Perſons that occur to Me. If they can find any *Others* who may be properly charged as Occupiers, Such other Perſons will not be included in or affected by the Opinion which We now give.

The only Perſons that I can think of, are 1ſt. The five *Leſſees*; 2dly. The *Servants* attending this Charity; and 3dly. The *poor mad Perſons*, who are the Objects of it.

Firſt—As to the *Leſſees*—*Mere* NOMINAL *Truſtees* can not be eſteemed Occupiers, or rated as ſuch. Beſides, theſe Leſſees are expreſsly excluded, by a ſpecial * Proviſo inſerted in the Leaſe, from converting the Building to any other than this ſpecifical Uſe: And the Leaſe is to determine and become void, if they do. They are ſo far therefore from being *Occupiers* of it, that they are *merely nominal*; mere *Inſtruments of Conveyance*; and have no more *Intereſt* in the Thing, than the Crier of the Court of Common Pleas has, when he is named as the laſt Vouchee in a Common Recovery. * *V. ante*, *pa.* 1056.

Secondly.—As to the *Servants* attending this Charity—They are not in a like Situation with the Officers of *Chelſea*-Hoſpital, or of the other Charitable Foundations that have been mentioned at the Bar, where there are *large Diſtinct Apartments* appropriated to the Uſe of the reſpective Officers, wherein they and their *Families* reſide. Thoſe Officers are *not* charged *as Servants* of ſuch Hoſpitals or as Inhabitants and Occupiers of the *ordinary* Rooms and Lodgings therein; but as having *ſeparate* and *diſtinct Apartments*, which are conſidered as their *Dwelling-houſes*. The Caſes that have been determined by the Judges, relating to the *Window-Tax*, are uniform in rating *Officers* of Hoſpitals for their *diſtinct Apartments*: But in *this* Hoſpital, there are neither any ſuch *Officers*, or any ſuch *Apartments*, as were in thoſe Caſes determined to be rateable.

*P. 1065. * If the first of these Orders, which rated *Joseph Mansfield* as the Occupier of this Hospital, had stood as it was originally drawn up, without being afterwards altered; And *if Mansfield* had actually had a separate and distinct Apartment in it (which is not now pretended;) Yet certainly He could not have been rated for any Thing more than his own *particular and distinct Apartment.* However, that Matter ceases now to be any part of the Case; there being no Foundation, by the *new* Order, to ground such a Question upon.

Thirdly.—As to the poor miserable Wretches who are the unhappy *Objects* of this Charity—It would be too gross to conceive *them* to be proper Persons to be rated to the Relief of the Parish. Therefore it is unnecessary to say any Thing on this head; and the rather, as it appeared so very unreasonable to the Counsel themselves who argued in Support of the Order, that they gave it up.

And *if* NO *Person* can be found, who is rateable to this Tax, It follows, by necessary Consequence, "That there "can be *no Rate* at all."

Therefore the ORDER must be QUASHED.

Thursday 13th November 1760.

Goodtitle, ex dimiss. Bridges et al', *vers.* Duke of Chandos.

UPON a Motion for a new Trial, made on the Part of the Defendant, upon the Foot of a *Misdirection* given to the Jury by the Judge who tried the Cause; (upon which Direction of the Judge, the Jury had found a Verdict for the Plaintiff;) the Case appeared, upon the Report of Mr. Just. *Noel*, (the Judge who tried the Cause,) to be as follows; *viz.*

Sir *Thomas Bridges* being seised in Fee, of the *Manor* and *Demesne* Lands of KEYNSHAM in *Somersetshire*, and of several *other* Lands in KEYNSHAM aforesaid, and also of several Estates in various other Places, made a Settlement of *all* these Estates at the Time of the Marriage of his Eldest Son, Mr. *Harry Bridges*, with his first Wife the Lady *Diana Hollis*; Sir *Thomas* having at that Time Five Sons living, *viz.* this Mr. *Harry Bridges*, *Edward Bridges*, *George Bridges* and two younger Sons.

The Settlement was to the Use of Sir *Thomas* himself for life, as to *Part*; with Remainder to his Eldest Son *Harry*, for Life; Remainder to the Heirs Male of *Harry*'s Body by that first Marriage; Remainder to the Heirs Male of his Body by any other Marriage;

Re-

* Remainder to Sir *Thomas*'s ſecond Son *Edward Bridges*, in ſtrict Settlement; Remainder to *George Bridges*, for Life; Remainder to *George*, in *Tail Male*; with Remainder to the right Heirs of Sir *Thomas*. The *Reſt* of the Eſtate was ſettled to the ſame Uſes, with this Difference only, *viz* That there was no Life-Eſtate to Sir *Thomas* Himſelf therein; but Mr. *Harry Bridges*'s Eſtate for Life took Place immediately. There was a Power given, by this Settlement, to Mr. *Harry Bridges*, to make a *Jointure upon a ſecond Wife*. * P. 1066.

Mr. *Harry B.* had no Iſſue by Lady *Diana*: But during her Life, He had an illegitimate Son, named *James Bridges*, by another Woman. After the Death of Lady *Diana*, and after the Birth of *James*, Mr. *Harry Bridges* (in his old Age) married a young Woman, (of the Name of *Freeman*;) Upon whom, purſuant to the Power given him, He ſettled about 280*l. per Annum* (being *Part of the Demeſne Lands of Keynſham*,) for her *Life*: And She ſurvived him, and lived till 1759.

Mr. *Harry Bridges* having no Iſſue by this laſt Wife nor by his former, and being Reverſioner or Remainder-Man in Fee (as before mentioned) of the *whole* Family-Eſtate; and his Brother *Edward*, and his two youngeſt Brothers being all dead without Iſſue; and his Nephew *George Rodney Bridges*, (the only Son of his Brother *George*) having no Child by his Lady; the ſaid Mr. *Harry Bridges* did, in his Life-time, by Bargain and Sale inrolled, grant this his Reverſion of the *Whole* ſettled Eſtate, to his natural Son *James Bridges*, the Leſſor of the Plaintiff.

But after the Death of *Harry*, and DURING THE LIFE of his Widow, (who was *Tenant for Life* of this 280*l. per Ann. Part of the Demeſne Lands of Keynſham*,) the ſaid *George Rodney Bridges*, (the only Son of *George* then deceaſed,) being Tenant in Tail in *Poſſeſſion* of *all the* REST of the Eſtate, except that Part which was ſettled upon the Widow, (who was *then living* and in *Poſſeſſion* of that Part;) but being Tenant in Tail in REMAINDER *only*, of THAT Part whereof the ſaid Widow was in Poſſeſſion as *Tenant for Life*; ſuffered a *Recovery*, in the Year 1728, of the *Whole* ſettled Eſtate; Uſing (at leaſt) ſuch Deſcriptions as might be *ſufficient* to include ALL *the Eſtate that lay in* KEYNSHAM, under the general Deſcription of *that* Part of the Eſtate: After the ſuffering of which Recovery, He ſettled the Whole Eſtate *included in the Recovery*, upon the Duke of *Chandos*; and then died. The Duke, upon the Death of the ſaid Mr. *George Bridges Rodney*, came into immediate Poſſeſſion of all the *Reſt* of the Eſtate, *Except that Part* which the Widow of *Harry* was in Poſſeſſion of for her Life as aforeſaid: And upon her Death, in 1759, He took Poſſeſſion of *that Part* alſo.

*P. 1067. * Whereupon, Mr. *James Bridges*, the Bargainee of the Reverſion in Fee, which was granted to him by his Father *Harry* as aforeſaid, brought this Ejectment againſt the Duke, for *that Part* of the KEYNSHAM-Eſtate which *Harry's* Widow died in Poſſeſſion of; Suppoſing that Mr. *George Rodney Bridges* could have *no* Power to ſettle THAT *Part* upon the Duke, whatever Power he might have over the *Reſt* of the Eſtate, (of which he was Tenant in Tail in *Poſſeſſion*, when He ſuffered the Recovery.)

The Duke, at the Trial, would have defended his Title, by ſetting up this Common Recovery ſuffered by *G. R. B.* the Remainder-Man in Tail; which He produced and proved: But the Duke being unable to give any Sort of Evidence of an *actual* SURRENDER of the Widow's *Life-Eſtate*, (which the Plaintiff urged to be neceſſary, in order to enable the Tenant in Tail in *Remainder* to make a good Tenant to the *Præcipe*;) the Counſel for the Defendant (the Duke of *Chandos*) inſiſted at the Trial, "That a "*Surrender* of the Life-Eſtate ought, *after ſo long a Time*, to "be PRESUMED; even although they ſhould give no Evi- "dence whatſoever, relating to any ſuch Surrender."

But Mr. Juſtice *Noel* was of Opinion, "That a Surren- "der by the Tenant for Life could NOT be *preſumed*; when "no Evidence at all had been given to render it in the leaſt "probable; and when the Poſſeſſion had not gone along "with the Recovery, but continued in the Tenant for "Life till the Time of bringing the Ejectment." And accordingly, He directed the Jury to find for the Plaintiff: Which they did.

Upon this *Miſdirection*, as the Duke's Counſel called it, they moved for a new Trial, and obtained a Rule to ſhew Cauſe: And Mr. Juſt. *Noel's* Report was, by Mr. Juſt. *Wilmot*, ſtated to this Court as above.

Upon its being argued in this Court,

Argument *ex parte Def'.*

The Defendant's Counſel (Mr. *Norton*, Mr. *Webb*, and Mr. *Thurlow*) relied upon the Caſe of *Warren, ex dimiſſ. Webb*, v. *Greenville*, *P.* 13 *G.* 2. *B. R.* reported in 2 *Strange* 1129: Where, upon a Trial at Bar, the Leſſor of the Plaintiff claimed under an old Entail in a Family Settlement, by which, Part of the Eſtate appeared to be in Jointure to a Widow, at the Time her Son ſuffered a Common Recovery, (which was in 1699;) And the Defendant, who claimed Title under the Recovery, *not* being able to *ſhew a Surrender* of the Mother's *Eſtate for Life*, it was inſiſted "That there "was no Tenant to the *Præcipe* for *that Part*; and that the "Remainder, under which the Leſſor claimed, was *not* "*barred.*"

" * *barred.*" To obviate this, it was inſiſted by the Defendant, " That at that *Diſtance of Time*, a Surrender ſhould " be PRESUMED; according to 1 *Ventr.* 257. and what " is * laid down in Mr. *Pigott*'s Book of *Common Recoveries.*" And to *fortify* this Preſumption, they offered to produce (in Evidence) the *Debt-Book* of Mr. *Edwards*, an Attorney at *Briſtol*, then long ſince deceaſed, wherein He had charged 32*l.* for ſuffering the Recovery; Two Articles of which Charge are—" For *drawing a Surrender of the Mother* 20*s.*" —and " For *engroſſing two Parts thereof*, 20*s.* more;" And that it appeared by the Book, " that the ſaid Bill was *paid.*" And this being objected to, as improper Evidence; The Court was of Opinion to *allow it:* For it was a *Circumſtance material* upon the Inquiry into the Unreaſonableneſs of preſuming a Surrender, and could not be ſuſpected to be done *for this Purpoſe*; And if *Edwards* was living, He might undoubtedly be examined to it; And after his Death, this was the *next beſt* Evidence. And it was accordingly *read.* After which, The Court declared, " That *without* this Circum-" ſtance, they would have PRESUMED *a Surrender*;" and deſired it might be taken Notice of, " That they *did* NOT " REQUIRE *any Evidence* to *fortify* the Preſumption, AF-" TER SUCH A LENGTH OF TIME."

*P. 1068.

* *V. Pigott* 41.

The Caſe referred to in 1 *Ventr.* 257. is there Anonymous: But it is S. C. with the Caſe of *Green* and *Froud*, in 3 *Keb.* 310, 311. and *Greene* v *Proude*, in 1 *Mod.* 117. (though differently reported) In *Ventris*, whoſe Report is much the beſt, it is ſaid, That in an Ejectment, upon a Trial at Bar, for Lands in Ancient Demeſne, there was ſhewn a Recovery in the Court of Ancient Demeſne, to cut off an Entail which had been *ſuffered a long Time ſince*, and the Poſſeſſion had gone accordingly: It appeared that Part of the Land was *leaſed for Life*; and the Recovery (with a ſingle Voucher) was ſuffered by him in Reverſion; and ſo *no Tenant to the Præcipe*, for *thoſe* Lands But, in regard the Poſſeſſion had followed it for ſo long Time, The Court ſaid " They would PRESUME *a Surrender:*" As, in an appropriation of great Antiquity, there has been preſumed a Licence, though none appeared.

The Paſſage in Mr. *Pigott's* Book (referred to by Sir *J. Strange)* is in Page 41. " It is apparent there muſt be a " Tenant to the *Præcipe* either by Right or Wrong. And " therefore, in many Caſes, it may ſeem wholly impracticable for thoſe who have the *Remainder in Tail*, to ſuffer a " Recovery. The moſt uſual Way is, for Him in Remain-" der, to get the Tenant for Life to ſurrender to him *con-" ditionally*: And in this, *though the Tenant for Life* KEEP " *the* POSSESSION, yet the Recovery will be GOOD."

* P. 1069 * In the Case of Dame *Griffin* v. *Stanhope*, *Cro. Jac.* 455. A Common Recovery being produced, the Counsel for the Defendant pressed the Lady's Counsel to *prove* who was Tenant to the *Præcipe*, at the Time of the Recovery. But the Court would not allow thereof: For it shall be INTENDED to be a *good* Recovery; And if it was otherwise, the proof ought to be made by the *other* Party.

And in 2 *Lutw.* 1549, at the End of the Case of *Leigh* v. *Leigh*, this last-cited Case appears to have been confirmed by Mr. Just. *Powell*, at *York* Assizes: And Sir *Edward Lutwyche* there lays it down, "That in *every* Common Recovery, it shall be *intended* that there was a good Tenant to "the *Præcipe*, *till the contrary is shewn* on the *other* Side."

Indeed it appears from *Lincoln*-College Case, 3 *Co.* 58. *b.* (there also cited,) "That where a Common Recovery was "had against the Remainder-Man in Tail, in the Life-time "of his Mother who was Tenant for Life; and She was "*expressly alledged* to be AD TUNC *Tenens* liberi Tenemen-"ti; It could *not* there be intended that She had surrender-"ed her Estate, or that her Son had entered for a Forfei-"ture." Yet even there, *rather* than the Common Recovery should be taken to be void for Want of a Tenant to the *Præcipe*, The Court *intended* "That he was in by *Dis-*"*seisin*."

There indeed She could not be intended to have surrendered; because it was alledged "that She was *ad tunc Tenens*." But in an *Ancient* Recovery, if Nothing appears to the Contrary, such a Surrender shall be *presumed*.

And it appears from *Pigott* 41. "That the Tenant for "Life's *continuing in Possession* makes no Sort of Difference."

They observed, that all the Cases lay the whole Stress of the Reason of their Determination, singly upon the *Length* of Time from the *actual* SUFFERING *the Recovery*; without shewing any kind of Regard to the Time of the *subsequent Continuation* of the Life-Estate, or to any *other* Circumstances whatsoever. And, as those Cases were in Ejectment, the Question could not turn upon the Length of Time that the Tenant in Tail in Remainder had been come into *Possession*: For after 20 Years, He would have been barred from bringing an Ejectment.

Now the Time in the present Case is about 32 *Years*: Which is *alone* sufficient to create this Presumption; especially since the Act of 14 *G.* 2. *c.* 20: By the 5th Section whereof, it is enacted, "That *after* 20 *Years from the*

"TIME

" *TIME OF SUFFERING, All Common Recoveries ſhall * P. 1070.
" be deemed good and valid to all Intents and Purpoſes; if
" it appears upon the Face of ſuch Recovery, that there
" was a Tenant to the Writ; And if the Perſons joining
" in ſuch Recovery had a ſufficient Eſtate and Power to
" ſuffer the ſame; *Notwithſtanding* the Deed or Deeds for
" *making* the Tenant to ſuch Writ ſhould be loſt or NOT
" APPEAR."

If it ſhould be objected, " That in the preſent Caſe Mr.
" *George Rodney Bridges* had NOT *a ſufficient Eſtate and*
" *Power* to ſuffer this Recovery," as being only Remainder-Man in Tail; The Anſwer is, " That *if* there *was* a
" Conditional Surrender of the Tenant for Life, then He
" *had* ſuch Power. And as nothing appears to the *contrary*,
" but that there might be ſuch a Surrender, it muſt there-
" fore be *preſumed*; and this Statute only limits the Time
" *within which* the Preſumption ought to ariſe."

The Plaintiff's Counſel, (Mr. *Gould*, Mr. *Huſſey*, Serj. *Davy*, and Mr. *Burland*,) who ſhewed Cauſe againſt granting a new Trial, argued in Support of Mr. Juſtice *Noel*'s Opinion; and aſſerted his Direction to be *right*. Argument *ex parte Quer'*.

They ſaid, there could be *no Preſumption*, without ſome *Facts* to ground it upon. In Mr. *Greenville*'s Caſe, in 2 *Strange* 1129, there was a *very ſtrong* Preſumption, ariſing from the Articles in Mr. *Edwards* the Attorney's Bill; the Proof whereof the Court allowed to be entered into, and received Satisfaction from.

And there is no Caſe where a Preſumption of a Surrender has been raiſed, without *Poſſeſſion* accompanying and following the Recovery. In 1 *Ventris* 257, (upon which Caſe, that in 2 *Strange* 1129, is ſaid to be founded) there was a *Poſſeſſion* which had followed the Recovery for a long Time: And that is the *very Reaſon there given* for the Court's making the Preſumption that they then made. That Reporter was a very eminent Man; and much more to be credited than *Keble*, or the Author of 1 *Mod.* So that that Caſe was not ſimilar to *Greenville*'s Caſe; or, at leaſt, not enough ſo to ſupport the Poſition which is ſaid to have been founded upon it.

As to 2 *Lutw.* 1549—It is nothing more than the Reporter's *own* Speculations; not any Determination of the Court.

And in the Caſe of *Lady Griffin* v. *Stanhope*, *Cro. Jac.* 455, the Perſon who ſuffered the Recovery was Himſelf Tenant in Tail; and the *Poſſeſſion* had gone along with the Recovery.

The

*P. 1071. * The *latter* Part of Sir *J. Strange*'s Report of *Greenville*'s Caſe is *inconſiſtent* with the former Part of it For it ſays, "That the Court declared, and deſired it might be taken "Notice of, that they did NOT *require any Evidence* to "fortify the Preſumption after ſuch a Length of Time:" And yet it appears by the former Part of the Caſe, "That "they had *entered into* ſuch Evidence, after it had been "objected to as improper, and the Objection had been con-"ſidered and over-ruled."

As to the Statute of 14 *G.* 2. *c.* 20. § 5. It never meant to alter the Law, ſo as to *give* Power to a Perſon to ſuffer a Recovery, who had *no Power before*; (which a Remainder-Man in Tail had not:) It is expreſsly confined to "Perſons "*having* a ſufficient Eſtate and Power to ſuffer the ſame."

The Statute of Limitations 21 *J.* 1. *c.* 16. only takes place from the Time of the *Title's Accruing*.

And the Rule, in all the Caſes cited, and in all Caſes of this kind, muſt, in Reaſon and Common Senſe, neceſſarily be underſtood to relate to the Length of Time that has elapſed *ſince the Tenant in Tail's Coming into* POSSESSION; and *not* to the Length of Time ſince the *Suffering* of the Recovery. For where the Tenant in Tail has been a long Time in Poſſeſſion, and has done Nothing to complete and confirm his former Act; there indeed it is *reaſonable to preſume* that all was rightly tranſacted before; becauſe if he knew his former Act to be defective, and his Title inſufficient, He would not have neglected to ſet it right as ſoon as it was in his Power to do ſo. But no ſuch Preſumption can ariſe from the mere Antiquity of the Recovery, *prior* to the Poſſeſſion of the Tenant in Tail.

The Outſtanding Life-Eſtate, even till 1759, is the ſtrongeſt Preſumption to the *Contrary*, *viz.* "That She did "*not* ſurrender her Eſtate."

Beſides, It does not at all appear from the Judge's Report, that Mr *George Bridges*, the Tenant in Tail in Poſſeſſion of *all the Reſt* of the Eſtate, and of which he *had* Power to ſuffer a Recovery, ever *meant or intended* to ſuffer a Recovery of THESE *ſettled Lands*, of which He had *no* Power to do ſo He had OTHER Lands in KEYNSHAM *upon which* the Recovery *operated*. And there is no Reaſon to imagine that He *meant* to include *theſe*, or ever *attempted to procure* a Surrender of the Life-Eſtate in *them*.

Lord MANSFIELD —I was of Counſel in that Caſe of Mr. *Greenville*, reported in Sir *John Strange's Reports*: And I remember very well, that the Point of Evidence was *ſtrong-*

ly

ly litigated. The Attorney, who had been concerned in the Tranſaction of the Common Recovery, was One Mr. *Edwards* of *Briſtol*, who had been then long dead. The *Entry* in his Bill Book was made at the *Time* of the tranſaction; and a *Receipt* had been given upon the Bill which contained the Articles for *drawing and engroſſing the Surrender*: So that there was *poſitive Proof*, in that Caſe, of an *actual Surrender*. And there, the Jointreſs had been *dead a vaſt Number of Years*; And the Perſon who ſuffered the Recovery, and his Son after him, had Both of them (during their reſpective Lives) ſufficient *Opportunity to have ſet it right*, after they came into Poſſeſſion, *if* they had known or ſuſpected it to have been defective: which was certainly a *Preſumption*, "That it was *regular*, and *not* defective." I am confident, that *All* that the Court did, or intended to do, in that Caſe, was only to take Care that it ſhould be underſtood, "That they did not mean to *ſhake* the *Authority* of any one "Caſe that had been founded upon Preſumption;" and "That they would not require *poſitive Proof* of a Surrender, "in any Caſe where there was *ſufficient* Preſumption of it." This Report is incorrect, conſidered as a Foundation for a Principle or Rule of Property; though it might be enough to ſerve the Taker of ſuch a Note, for a Memorandum, to refreſh his own Recollection. *P. 1072.

If that be ſo, then conſider the preſent Caſe upon *Principles.*

There are *two* Sorts of *Preſumptions*: One, a Preſumption of *Law*, not to be contradicted; The Other, a Species of *Evidence*; which (latter) muſt have a *Ground* to ſtand upon, ſomething *from whence* it is to ariſe.

It is now fully ſettled and eſtabliſhed, That a Tenant in Tail may, if he pleaſes, either turn his Eſtate Tail into a *Fee*, or *alienate* it for his own Benefit, by duly ſuffering a Common Recovery.

But he muſt have * A SUFFICIENT *Eſtate* and *Power*, to qualify him to ſuffer ſuch Recovery. *V. ante* 116 to 119.

He muſt either be a Tenant in Tail *in Poſſeſſion*; or he muſt have the Concurrence of the Freeholder who claims under the ſame Settlements.

This principle is † adhered to, by the ſtatute of 14 *G.* 2. *c.* 20. † *V. ante* 116.

The *Tenant for Life*, whoſe Conſent is neceſſary to the Tenant in Tail in Remainder, to enable him to cut off the Entail, is *not* the Leſſee of the Land under a beneficial Leaſe; but the *Original* Tenant for Life claiming under the Family-Settlement, and having a Life-Eſtate ſettled upon him,

prior

*P. 1073. * *prior* (in order of Succeſſion) to the Other's Remainder in Tail.

Where a Perſon has *Power* to ſuffer a Recovery and thereby bar the Eſtate Tail, *Omnia præſumuntur ritè et ſolemniter acta*, until the contrary appears: And it is reaſonable that it ſhould be ſo. But if the *Contrary* ſhall *appear*, there is an End of the Preſumption. This was the Caſe of the Earl of *Suffolk*'s Recovery, upon a Trial at Bar in this Court in *Eaſter* Term 1747. * There the Contrary *did* appear: And the Preſumption was thereby deſtroyed There were blundering Deeds actually produced, which appeared clearly to be wrong; And it was manifeſt, upon the Evidence diſcloſed, that there was NO good Tenant to the *Præcipe*. It was therefore impoſſible for the Court, in *that* Caſe, to preſume "that there *was* One."

* *Keene, ex dimiſſ. Lady Portſmouth, Mr. Whitwell, and Lord Hervey, v. Earl of Effingham:* 20 *May* 1747.

But if a Man has *Power* to ſuffer a Recovery, That is a ſolid and reaſonable Ground for preſuming "that all was "done rightly and regularly;" *unleſs* ſomething to the contrary ſhall appear.

So, where the Freeholder is a *Truſtee* for the Tenant in Tail Himſelf, and *under his Power and Direction*, it is a reaſonable and juſt Cauſe for preſuming "that every thing "was regularly tranſacted."

So, where the Perſon or Perſons intereſted to *object* againſt the Validity of a Recovery have had *Opportunity to make Objections* to it, but inſtead of doing ſo, have *acquieſced* under it, and not at all diſputed its Validity; This is a Preſumption "That all was right and regular," foraſmuch as they never did object to it.

But there can be no Preſumption of the Nature of Evidence, in *any* Caſe, without *Something from whence* to make it; *ſome Ground* to found the Preſumption upon. Whereas here is *abſolutely Nothing* from whence to preſume; *no Sort of Ground* to build any Preſumption upon. The ſingle Pretence to any the leaſt Ground of Preſumption in the preſent Caſe, can be only this, "That no Tenant in Tail in Re-"mainder would ſuffer a Recovery *without* firſt getting a "Surrender of the Life Eſtate, in order to make it valid "and effectual."

But even that Ground (ſlight as it is) will not hold in the Caſe *now* before Us: For it does not at all appear, upon the Report of the Judge, that Mr *George Bridges* (who ſuffered the Recovery in Queſtion) had the *leaſt Intention* whatſoever to include *thoſe* PARTICULAR *Lands*, in the Recovery which He ſuffered, and had a *full Power in Himſelf alone*, to ſuffer, of *all the Reſt* of the Eſtate, whereof He was at that Time Tenant in Tail in *Poſſeſſion*. He was then in

* in Poſſeſſion of the *Manor* of *Keynſham* and of OTHER *Lands in Keynſham* ſufficient to anſwer the general Deſcriptions uſed in the Recovery, relating to ſuch Part of the recovered Eſtate as lay in *Keynſham*. He muſt probably know, or have been informed by his Counſel or Agents, that he could have no ſuch Power over the ſettled Part, without obtaining a Surrender of the Life-Eſtate. He might perhaps be ſatisfied that He *could not obtain a Surrender* of the Life-Eſtate in theſe ſettled Lands: Or He might have attempted to obtain it, and *failed* in ſuch Attempt. *P. 1074.

IF the *mere* ſingle Fact of the Remainder-Man in Tail ſuffering a Recovery, was *alone* ſufficient to ground a Preſumption of a Surrender of the Life-Eſtate, It would be in the Power of *every* Remainder-Man in Tail, to bar the Eſtate Tail, notwithſtanding that the Tenant for Life ſhould *abſolutely refuſe* to join with him in ſuffering a Recovery. Therefore it is neceſſary that there ſhould be Facts and Circumſtances to ground a Preſumption of ſuch a Surrender upon.

Whereas, in the preſent Caſe, it is ſo far from being reaſonable to preſume "That there *was* ſuch a Surrender from "the Jointreſs, in order to bar the Eſtate Tail in Remain-"der, and give the Power of Diſpoſal to *George* in Preju-"dice to *James Bridges*;" that there are, on the contrary, many Reaſons to induce a Suſpicion, "that there was *not* "ſuch a Surrender." She might have more Regard for *James*, than for *George*; She might have a Friendſhip for *James*, and a Diſlike to *George*; She might think it wrong or unkind, to hurt the Reverſioner; Or even Whim and Peeviſhneſs might prevent her from interfering: There is no Defining the various Reaſons She might have, to hinder her from ſurrendering her Life-Eſtate for ſuch a Purpoſe.

Mr. *George Bridges* being only Tenant in Tail in Remainder, and the Life-Eſtate under the ſame Settlement ſtill ſubſiſting, at the Time of his ſuffering the Recovery; It is clear that He had NO POWER to alien or to bar: And there is *Nothing from whence to preſume a Surrender* of the Life-Eſtate, to enable him to do ſo.

IF He had had a *Power* to bar or alien, then indeed *no Preſumption* could have been *too large*; in order to prevent Slips in legal Forms and Methods of Conveyance, and effectuate the Intention of a Perſon who had a legal Right to do ſuch an Act.

The Act of 14 *G.* 2. *c.* 20. means to preſerve the ſame Negative to Perſons claiming under the Family-Settlement, as they had before.

And

*P. 1075. * And no Argument can be drawn, in the preſent Caſe, from *Length of Time*; Becauſe the Jointreſs died but in 1759; and the Ejectment was inſtantly brought.

Upon the Whole, there is no Colour for objecting to the Judge's Direction.

Mr. Juſt. DENISON and Mr Juſt. WILMOT concurred: And

Mr. Juſt. WILMOT added, That He had no Notion of a *Preſumption*, without ſome *Facts* or *Circumſtances* to found it upon. This would be inferring ſomething ſeen, from ſomething not ſeen.

Length of Time ALONE is Nothing: The Preſumption muſt ariſe from ſome *Facts* or *Circumſtances* ariſing within that Time.

The COURT were All clear and unanimous, That this Rule ought to be diſcharged.

At the Sittting of the Court, the next Morning,

Lord MANSFIELD mentioned this Caſe again.

He ſaid He had looked into his own Notes of the Caſe of *Warren on the Demiſe of Webb*, againſt *Greenville*, where the Recovery was of 40 Years Standing: And the Court did lay it down, in that Caſe, "That *after* a Recovery of "40 *Years Standing*, they would, *without any other Circum-* "*ſtances*, preſume a Conditional Surrender to have been "made by the Tenant for Life;" And they relied upon 1 *Ventr.* 257. and Mr. *Pigott's* Book, *Pa.* 41. But his Lordſhip obſerved, that there are *other Circumſtances* in the Caſe in *Ventris*; And there is *Nothing* in *Pigott*, to juſtify this *general* Poſition. And He added, that in the Caſe then at the Bar, The Court did (as He had taken it down) *admit as Evidence* the Entry in the Attorney's Book, as has been mentioned.

He ſaid, He was rather more ſtrongly of Opinion than He was Yeſterday, "That in the preſent Caſe, there is *no* "*Ground for a Preſumption* that there was any Surrender "by the Tenant for Life." Here are two particular Reaſons *againſt* making any ſuch Preſumption. One is, that there does not appear to have been any *Intention* in the Remainder-Man in Tail, to ſuffer a Recovery of *theſe* particular Lands: The other is, That here was *no Poſſeſſion* at all under this Recovery; but, on the Contrary, the Ejectment was brought, and the Validity of the Recovery put into Litigation, *immediately* after the Death of the Tenant for Life.

If

* If the Eldeſt Son, who has a Remainder in Tail under a Family-Settlement, ſhould privately ſuffer a Common Recovery, and his Father live many Years afterwards; It might as well be argued "that Length of Time from the Date of "the Recovery ſhould induce a Preſumption that the Father "ſurrendered his Eſtate for Life." * P. 1076.

And his Lordſhip declared himſelf as clear, that if there *had* been a long Poſſeſſion by the Tenant in Tail after the Death of the Tenant for Life; though ſuch a Poſſeſſion might be aſcribed to the Entail; the Preſumption *ought* to have been made, upon the Ground of *Acquieſcence* under it, and the Probability ariſing therefrom, "That the Parties "KNEW that the Recovery was *not* defective."

Rules of property ought (His Lordſhip ſaid) to be *generally known*, and not to be left upon looſe Notes, which rather ſerve to *confound* Principles, than to *confirm* them. He therefore propoſed to have a *Conference* with all the Judges upon this Caſe: Which Propoſal did not ariſe, He ſaid, from any *Doubt* about the Matter; (for He was more confirmed in his Opinion, than He was Yeſterday;)but for the Sake of having ſo conſiderable a Rule of Property *ſettled*, and of rendering it *notorious* and *public*. For which Purpoſe, He (at firſt) ordered it to ſtand over till next Term: But afterwards, upon its being agreed by all the Parties, that in Mr. *Greenville*'s Caſe, there was a great Number of Years during which the Tenant in Tail had been in *Poſſeſſion* after the *Death* of the Tenant for Life; and upon the now Defendant's Counſel candidly declaring, "That they them-"ſelves were *fully ſatisfied* with the preſent Opinion of the "Court;" He retracted his Propoſal, and ſaid He would not trouble the Judges with it, ſince the Counſel were ſo candid as to acquieſce entirely in the Opinion that the Court had already intimated.

His Lordſhip further added, That he would have it underſtood, That POSSESSION *of the Tenant in Tail, after* the *Death* of the Tenant for Life, *does* leave a *Ground* of Preſumption "That there was a Surrender." But in the preſent Caſe, here is NO *Poſſeſſion* after the Death of the Tenant for Life: the Ejectment was brought *immediately*.

Therefore, Let the RULE of Yeſterday ſtand.

Palmes

*P. 1077. * Palmes Robinſon, Eſq; *verſ.* Anne Bland, *Spinſter*, Adminiſtratrix de bonis non *of* Sir John Bland, Bart. *deceaſed.*

Saturday 15th November 1760.

THIS was a caſe reſerved at *Niſi prius* at *Weſtminſter-Hall*, before Ld. *Mansfield*, 22d *May*, 1760.

The Action was an Action upon the Caſe upon ſeveral Promiſes: And the Declaration contained 3 Counts. The 1ſt Count was upon a *Bill of Exchange*, drawn at *Paris*, by the Inteſtate Sir *John Bland*, on the 31ſt of *Auguſt* 1755, and bearing that ſame Date; *on Himſelf in* ENGLAND; for the Sum of 672l Sterling, payable to the Order of the Plaintiff, TEN DAYS *after Sight*, Value received and accepted by the ſaid Sir *John Bland*. The 2d Count was for 700l Monies *lent and advanced* by the ſaid Plaintiff to the ſaid Sir *John Bland*, at his Requeſt. The 3d Count was for 700l. Monies *had and received* by the ſaid Sir *John Bland*, to and for the Uſe of the Plaintiff. And the Plaintiff's Damage is laid at 800*l.*

The Defendant pleaded the General Iſſue, "That Sir "*John Bland* did not undertake and promiſe, *&c.*" And Iſſue was joined thereon.

The Verdict was found for the Plaintiff, and 672l. given for Damages; ſubject to the following Caſe ſtated for the Opinion of the Court, on the following Facts proved and admitted: *Viz.*

That the Bill of Exchange was given at *Paris*, for 300*l.* there LENT by the Plaintiff to Sir *John Bland*, *at the* TIME *and* PLACE *of* PLAY; and for 372*l.* more LOST at the *ſame Time and Place*, by Sir *John Bland*, to the Plaintiff, *at* PLAY.

That the Play was *very fair*: And there is not any Imputation whatſoever on the Plaintiff's Behaviour.

That there were ſeveral Gentlemen and Perſons of Faſhion then and there at Play, beſides the Plaintiff and Sir *John Bland*.

That in FRANCE, *Money* LOST AT PLAY, *between* GENTLEMEN, *may be* RECOVERED *as a Debt of Honour*, before the *Marſhals of France*, who can enforce Obedience to their Sentences by *Impriſonment*; though ſuch Money is NOT *recoverable* in the ORDINARY *Courſe of Juſtice.*

That

* That Money LENT *to play with*, or at the *Time* and *Place* of *Play*, *may be recovered there*, AS A DEBT, *in the* ORDINARY *Courſe of Juſtice*; there being NO *poſitive Law* againſt it. * P. 1078.

That Sir *John Bland* was, and the Plaintiff is a *Gentleman*.

The Queſtion was—Whether, under *theſe Circumſtances*, the Plaintiff is intitled to recover ANY *Thing*, and WHAT, againſt the Defendant.

It was firſt argued on *Tueſday* 17th *June* laſt, by Mr. Serj. *Hewitt* for the Plaintiff, and Mr. *Blackſtone* for the Defendant: And again, Yeſterday and To Day, by Mr. *Wedderburn* for the Plaintiff, and Mr. *Coxe* for the Defendant.

Upon the Concluſion of this ſecond Argument,

Lord MANSFIELD ſaid that in the preſent Caſe, the Facts ſtated ſcarce leave Room for any Queſtion; becauſe the Law of *France* and of *England* is the ſame.

The firſt Queſtion is, Whether the Plaintiff is intitled to recover *upon* this BILL OF EXCHANGE, by Force of the *Writing*.

The ſecond Queſtion is, Whether He is intitled to recover upon the original Conſideration and CONTRACT, by the Juſtice and Equity of his Caſe, *excluſive* of any Aſſiſtance from the Bill of Exchange, and taking that to be a *void Security*.

As to the 1ſt Queſtion, the Defendant has objected "That "the Conſideration of the Bill of Exchange is, wholly, "Money won and lent *at Play*. Therefore, *by force of the* "WRITING, the Plaintiff can not by the Law of *Eng-* "*land* recover; ſuch Security being utterly void." And, no Doubt, the Law of *England* is ſo. 1ſt Queſtion.

There are *three Reaſons* why the Plaintiff cannot recover here, upon this *Bill of Exchange*.

1ſt. The Parties had a *View* to the Laws of *England*. The Law of the *Place* can never be the Rule, where the Tranſaction is entered into with an *expreſs* View to the Law of *Another* Country, as the Rule by which it is to be governed. *Huberi Prælectiones*, *Lib.* 1. *Tit.* 3. *Pa.* 34. is clear and diſtinct: "*Veruntamen &c. locus in quo Contractus &c. potius* "*conſiderand' &c. ſe obligavit.*" *Voet* ſpeaks to the ſame Effect.

Now

* P. 1079 * Now here, the *Payment* is to be in *England:* It is an *Engliſh Security*, and ſo intended by the Parties.

2d Reaſon—Mr *Coxe* has argued very rightly, "That "Sir *John Bland* could never be called upon abroad for "Payment of this Bill, *till* there had been a wilful De- "fault of Payment *in England*." The Bill was drawn by Sir *John Bland* on Himſelf, *in England*, payable ten Days after Sight.

In every Diſpoſition or Contract where the Subject Matter relates *locally* to *England*, the Law of *England* muſt govern, and muſt have been intended to govern. Thus, a Conveyance or Will of *Land*, a *Mortgage*, a Contract concerning *Stocks*, muſt be all ſued upon *in England*; and the *local Nature* of the Thing requires them to be carried into Execution according to the Law here.

3d Reaſon—The Caſe don't leave Room for a Queſtion. For the Law of *both* Countries is the *ſame*. The *Conſideration* of the Bill of Exchange might, in an Action upon it, be gone into *there*, as well as here. And as to the Money *won* at Play, It could not be recovered in any Court of Juſtice *there*, notwithſtanding the Bill of Exchange.

This Writing is, *as* a Security, void, (being for a Gaming Debt,) both in FRANCE and in *England*. We may therefore lay the Bill of Exchange out of the Caſe: It is very clear, the Plaintiff can not recover upon *that* Count.

2d Queſtion. Second Queſtion. Then as to the *other Counts*, for Money had and received to the Plaintiff's Uſe, and for Money lent and advanced to him.— Conſider it diſtinctly, as to each Part; the Money WON, and the Money LENT.

1ſt. As to the Money *won*.—By the Rule of the Law of *England*, no Action can be maintained for it.

To this it has been objected, "That the Contract was "made *in* FRANCE. Therefore, *ex Comitate*, the Law "of *France* muſt prevail, and be the Rule of Determina- "tion."

I admit that there are many Caſes where the Law of the Place of the Tranſaction ſhall be the Rule: And the Law of *England* is as liberal in this reſpect, as other Laws are. This is a large Field, and not neceſſary now to be gone into.

It has been laid down, at the Bar, "That a *Marriage* in "a foreign Country muſt be governed by the Law of *that* "Country

" * Country where the Marriage was had:" Which, in *general*, is true. But the Marriages in SCOTLAND, of Perſons going *from hence for that Purpoſe*, were inſtanced by way of Example. *They* may come under a very *different* Conſideration, according to the Opinion of *Huberus*, *p* 33. and other Writers. * P. 1080.

No ſuch Caſe has yet been litigated in *England*, except One, of a Marriage at *Oſtend*; which came before Lord *Hardwicke*; who ordered it to be tried in the Eccleſiaſtical Court: But the Young Man came of Age, and the Parties were married over again; and ſo the Matter was never brought to a Trial.

The Point that the Plaintiff muſt reſt upon, in the preſent Caſe, is this —— " The Money was *won in France*; " therefore it ought to be governed by the *Law of France*; " And it is recoverable *there* before the Marſhals of *France*, " who can inforce Obedience to their Sentence."

The *Parliament of Paris* would pay no Regard to *their Judgment*, nor carry it into Execution. The Marſhals of *France* proceed PERSONALLY againſt *Gentlemen*, as to Points of Honour, with a View to prevent Duelling.

They could not have taken Cognizance of the preſent Matter. It was not within their Juriſdiction. It was no Breach of Honour *in France*: For the Money was payable *in England*; And Sir *John Bland* could not be ſaid to have *forfeited* his Honour, *till* the Ten Days were out, and *till* the Money had been demanded in *England*, and Payment refuſed there. Sir *John Bland* was actually *dead* in a very ſhort Time after he gave the Note. The Marſhals of *France* can only proceed *perſonally* againſt the Gentleman who loſes the Money; but have no Power over his *Eſtate* or *Repreſentatives*, after his *Death*.

Therefore, as to the Money WON, The Contract is to be conſidered as *void* by the Law of FRANCE, as well as by the Law of *England*: Which makes it unneceſſary to conſider " how far the Law of *France* ought to be regarded."

Next, as to the Money LENT—The Senſe of the Legiſlature ſeems to Me to be agreeable to the *Caſes that have been cited. * *V. Haſſey* v. *Jacob*, *Carthew*, 365. 5 *Mod.* 175. 1 *Salk.* 344. 1 *Ld. Raym.* 87. *Bowyer* v. *Bampton*, 2 *Strange* 1155. *Barjeau* v. *Walmſley*, 3 *Strange* 1249. and *Slater* v. *Emmerſon*, before *Eyre* Ld. Ch. J. C. B. at the Sittings at *Guildhall*, after *M.* Term 1 *G.* 2.

The Act of 16 *C.* 2. *c.* 7. § 3. does not meddle with Money LENT at Play. But, as to Money (exceeding 100 *l.* *loſt*, and not paid down at the Time of loſing it, it ſays, " That

* P. 1081. "* That the Loſer ſhall not be compellable to make it good; "but the CONTRACT AND CONTRACTS *for the ſame* "*and for every Part thereof*, and all Securities ſhall be ut- "terly void, *&c.*" The Words "*Contract and Contracts* * *C.* 14. "*for the ſame*" are not in 9 *Ann.* * and I dare ſay were *deſignedly* left out: It only ſays "That all Notes, Bills, "Bonds, Judgments, Mortgages or other *Securities*, *&c.* for "Money WON *or* LENT *at Play* ſhall be utterly void, *&c.*"

Here the Money was *fairly lent*, without any Imputation whatſoever. Sir *John Bland*, the Borrower of it, being in a foreign Country, might very naturally have been diſtreſſed, under his then Situation among Foreigners, for want of having ready Money or knowing how to procure it: And it might be even a kind and generous and commendable Act, to lend it to him at that Time, to extricate him from his Difficulties, as He was then circumſtanced. The Jury have left it quite open to the Court to determine "Whether "*any* Thing, and WHAT, is recoverable. As to the Money WON, We think it can *not* be recovered: As to the Money LENT, the Plaintiff is *intitled* to it, both by the Law of *England* and by the Law of *France*.

* *V. poſt.* 1085. INTEREST will be payable * upon this Bill, after the Expiration of the Ten Days. The Queſtion will be, "How "FAR the Intereſt ought to be *carried down*." It is generally ſaid, To the Day of "the *Writ brought*," i. e. of Commencing the Action. But I do not ſee why it ſhould not be carried *further*: It is equally *reaſonable*, it is the *Right* of the Party, to have it to the *laſt Act of the Court aſcertaining* the Sum due.

I have long wiſhed for an Opportunity to have this Point conſidered by the *Court*; Becauſe I would not take upon Myſelf, at *Niſi prius*, to change what has commonly been the Practice.

But, as to this *laſt Point*, We will think of it for a Day or two.

Mr. Juſt. DENISON gave no Opinion now, on this laſt Point. As to the Reſt, He ſaid it is a plain clear ſhort Caſe: It is determinable by the Rules of the *Common* Law, and *no other* Law.

The Money is made *payable in England*. As it is a *foreign* Bill of Exchange, it muſt of Courſe be *dated* abroad: But it is to be *paid* here at Home. And the Plaintiff has appealed to the Laws of *England*, by bringing his Action here; and ought to be determined by *them*.

But by the Laws of *England*, the SECURITY is *void*: Which might have been *pleaded*, as well as it might be given in

* in *Evidence*; And the Defendant needed not, in his Plea, to have ſaid WHERE it was won at Play. And being a tranſitory Action, it muſt then have been tried where the Action was *brought*: And ſo it muſt have been, if the Plea had been *local*. Indeed in many Caſes that *might* be put, the Determination muſt have been according to the Laws of the Place where the *Fact* aroſe. But the *preſent* Caſe is not ſo: *Here*, the Security is *void* by the Laws of the Country where he brings his Action upon it. And his Security is one *entire* Security *both* for the Money *won* at Play, and the Money *lent* at Play. * P. 1082.

There is a *Diſtinction* between the *Contract*, and the SECURITY. If Part of the CONTRACT ariſes upon a *good* Conſideration, and Part of it upon a *bad* One; it is *diviſible*. But it is otherwiſe as to the SECURITY: That, being *entire*, is bad for the *Whole*.

Therefore the Plaintiff ought to be barred of this Action *upon this Bill of Exchange*, as being a void Security by the Laws of this Country where he brings his Action. But ſtill the CONTRACT *remains*: And he has a Right to maintain his Action for *ſo much* of his Demand as is *legal*; which is the Money LENT.

As to the Time of Carrying down the *Intereſt*, it may be proper to conſider of it a little While.

Mr. Juſt. WILMOT——Here are two Sums demanded, which are blended together in one Bill of Exchange; but are *diviſible* in their Nature.

As to the Money LENT—The Caſes that have been cited are in Point "that it is *recoverable*." But if there were None, yet I ſhould be clear that the Plaintiff may maintain an Action for *that*.

As to *Contracts* being good, and the *Security* void—The *Contract* may certainly be *good*; though the Security be void: And I think that this Contract is good; though the Security is void, by the Statute of 9 *Ann* *. This is not ſtated to be Money lent to *play with*, or for the *Purpoſe* of Play; but "lent at the *Time* and *Place* of Play" only: Nothing appears upon this Caſe, to induce any Suſpicion that it was lent for any *bad* Purpoſe. * 9 *Ann.* c 14. § 1.

The Statutes meant to prevent exceſſive Gaming, and to vacate all *Securities* whatſoever for Money won at Play: And the genuine true and ſound Conſtruction of 9 *Ann.* is to underſtand it as intended to prevent any *Securities* being taken for Money *won* at Play, or lent to *play with*, when the Borrower had loſt all his *ready* Caſh; but *not* to make the *Contract* itſelf void, where the Money is *fairly* and *bonâ fide lent*, though at the Time of Place and Play.

* P. 1083. * As to the INTEREST that ſhall be given to the Plaintiff upon the *Sum lent*, in the Aſſeſſment of the Damages—This is an Action that ſounds in *Damages:* And the *true Meaſure* undoubtedly is the *Damage* which the Plaintiff ſuſtains by the Non-performance of the Contract; And that Damage is the *whole* Intereſt due upon the Sum lent; *viz.* from the Time of its being payable, up to the Time of *ſigning the Judgment*. Nay, even then, He may *ſuffer*; He may *ſtill* be kept out of his Money, by Writ of Error, for a further Time. According to my Memory, Lord *Coke*'s Expoſition of the * Statute is, that the "*Coſts of the* WRIT" ſhall extend to all the legal Coſts of the *Suit*.

* *V.* 2 *Inſt.* 288. on *Stat. Glouc.* 6 *Edw.* 1. *accord'.*

The preſent Caſe, notwithſtanding the Queſtions that have been agitated in arguing it, comes out to be no Caſe at all; no Point at all; no Law at all.

Indeed, "Whether an Action can be ſupported in *Eng-*
"*land*, on a Contract which is void by the Law of *Eng-*
"*land*, but *valid* by the Law of the Country where the
"Matter was tranſacted," is a great Queſtion: (though I ſhould have no great Doubt about *that*.) But *that* Caſe does not exiſt here: For it is *not* here ſtated, "that ſuch a
"Debt as this, for Money *won* at Play in *France*, is *reco-*
"*verable* in the *ordinary* Courts of Juſtice there;" but quite the *Contrary*. So that the Laws of *France* and of *England* are the SAME as to the Money WON: The Contract is void as to *that*, by the Laws of *both* Countries.

And as to this wild, illegal, fantaſtical Court of HONOUR, the Court of the Marſhals of *France*, acting only *in perſonam*, contrary to the univerſal and general Laws even of the Country where the Tranſaction happened, and contrary to the Genius and Spirit of our own Law too; It would be abſurd to ſuppoſe, that the bare poſſible accidental Chance of a Recovery in that Court ſhould be a Foundation for maintaining an Action here, upon a Matter prohibited by the Laws of *both* Countries.

Beſides, Sir *John Bland* Himſelf, as it ſeems, was not, and the *preſent Defendant*, the Perſon *now* before this Court, *could never have been* the object of the Juriſdiction of *that* Court. The Remedy there, in its utmoſt Extent, was only *in Perſonam*; And this Defendant is an *Adminiſtratrix*, only.

A ſtrong Reaſon for the Plaintiff's recovering in this Action the Money LENT, is, that the Bill of Exchange is payable *in England*; And therefore it ſhall be determined according to the *Laws* of *England*, where it is payable. As in the Caſe of Sir *John Champant* v. *Ld. Ranelagh*, *Mich.* 1700.

* 1700. *in Chancery*, (reported in *Precedents in Chancery* 128.) A Bond was *made in England*, and *ſent over to Ireland*, and the Money to be *paid* there; But it was not mentioned *what Intereſt* ſhould be paid: My Lord Keeper was of Opinion, "That it ſhould carry *Iriſh* Intereſt." Therefore, as *this* Money was *payable in* ENGLAND, the Law of *England* muſt be the Rule of recovering it. * P. 1084.

I give *no Opinion* as to the *other* Point: Yet I can not help thinking, that where a Perſon *appeals* to the Law of *England*, He muſt take his Remedy according to the Law of *England*, to which He has appealed.

There is no Difference, in this Caſe, between the *Statute Law*, and the *Common* Law of *England*: A Contract can not be *maintained* upon the One, that is *void* by the Other.

The *Law of the Place* where the Thing happens does not *always* prevail. In many Countries, a Contract may be maintained by a Courteſan for the Price of her Proſtitution; And one may ſuppoſe an Action to be brought here, upon ſuch a Contract which aroſe in ſuch a Country: But that would never be allowed in *this* Country. Therefore the *Lex loci* can not in *all* Caſes govern and direct.

The *Sentences* of foreign Courts have always *ſome* Degree of Regard paid to them, by the Courts of Juſtice here: And it is very right that an Attention ſhould be paid to them, as far as they ought to have Weight in the Caſe depending.

But if a Man *Originally* appeals to the Law of *England* for Redreſs, He muſt take his Redreſs according to that Law to which He has appealed for ſuch Redreſs. Therefore if this Rule of Determination was different, by the Law of *France*, from our Rule here, yet I ſhould *incline*, that the Law of *England* where the Action was brought, ſhould prevail againſt the Law of *France*, if they did really claſh with Each other; becauſe the Party ſeeking Redreſs has choſen to *apply here*. But I give *no Opinion* at all, on this Point.

As to the Money LENT—There can be no Doubt; becauſe there is no Law either in *England* or *France*, that hinders the Plaintiff from maintaining his Action for it.

As to the *Carrying down the* INTEREST to a fixed Time,

THE COURT took Time to conſider that *ſingle* Point.

*P. 1085. * And on *Saturday* the 22d of *November*, Lord MANSFIELD delivered the Reſolution of the Court, upon that Point, to the following Effect.

We have given our Opinion already upon all the Parts of this Caſe, except the ſingle Point of CARRYING DOWN THE INTEREST: Which Opinion was, "That the Plaintiff could only recover 300*l.* the Principal Sum *really and bonâ fide* LENT by the Plaintiff to Sir *John Bland* at *Paris*."

The remaining Queſtions are—"Whether it ſhould CARRY *Intereſt*;" And, "*To* WHAT TIME ſuch Intereſt ought to be computed and allowed."

As to the former of theſe two Queſtions, The Caſe ſtated is "That the Bill of Exchange was given *at Paris*, for 300*l.* *there* LENT *by the Plaintiff* to Sir *John Bland*; for which, He gave the Plaintiff a Security *void*, in Point of Law, AS a *Security*." But the GIVING *the Bill of Exchange, upon ſuch Conſideration*, is ſtated in the Caſe, as a *Fact admitted*; and ſhews that, upon the Loan, the *Intention* and *Agreement* of the Parties was, "that the Money *ſhould carry Intereſt*, if not repaid within the limited Time."

The CONTRACT remains *good*, though he gave a *void* SECURITY to perform it. So that it is a LIQUIDATED Sum which *carries Intereſt* from the Time at which it was *agreed to be paid*.

But the Queſtion is, "Whether it is to STOP at the *Commencement of the Action*; or to be *carried on* to the Time of *liquidating* the Debt by the *Verdict* or by the *Judgment*."

This Difference is very ſmall, in the preſent Caſe, and ſcarce worth litigating between theſe Parties. But I am glad of the Opportunity which this Caſe offers, of *diſcuſſing the Queſtion* and *ſettling the Point*, to be a Rule for all Caſes of the ſame Nature that may hereafter ariſe.

The *general Practice* of Aſſociates, in taking Damages in theſe Caſes, is (I am informed) to ſtop at the *Commencement* of the Action, and to allow the Intereſt *no further down*. But this Practice, however general, is NOT *founded in Law*, but in *Miſtake* and *Miſapprehenſion*. And this will appear very plain, whether it be conſidered upon the Foot of natural *Juſtice*, or *Law*.

Firſt,

* First, in Point of JUSTICE——Nothing can be more agreeable to *Juſtice*, than that the Intereſt ſhould be carried down quite to the *actual Payment* of the Money. But as that cannot be, it ſhould be carried on as far as to the Time when the Demand is * *completely liquidated.* * P. 1086.

* *V. poſt Bodily* v. *Bellamy*, 22d *November* 1760. S. P. *pa.* 1096 & 1098.

Although this be *nominally* an Action for *Damages*, and *Damages* be *nominally* recovered in it; yet it is really and effectually brought for a *ſpecific Performance of the Contract.* For where Money is made payable by an Agreement between Parties, and a *Time given for the Payment* of it, this is a Contract to pay the Money *at* the given Time; and to *pay Intereſt* for it *from* the given Day, in Caſe of Failure of Payment at that Day. So that the Action is, in Effect, brought to obtain a *ſpecific Performance* of this Contract. For, *pecuniary Damages* upon a Contract *for Payment of Money*, are, from the Nature of the Thing, a ſpecific Performance; And the Relief is defective, ſo far as *all* the Money is not paid.

Then, to conſider it upon the *Common* and *Statute* LAW.

There is *no Statute*, nor any Principle of the *Common* Law, againſt it. We have looked into all the *Statutes* that can be ſuppoſed to concern this Practice: And there is *no Statute* that has any Reference to the Matter.

The Damages given by *Statutes*, are Where the Action is againſt ſuch as come in *under Wrong-Doers* only; or where a *ſpecific Thing* is to be recovered.

It is agreeable to the Principles of the *Common* Law, that wherever a Duty has incurred, *pending* the Writ, for which *no Satisfaction* can be had by a *new Suit*, ſuch Duty ſhall be INCLUDED in the Judgment to be given upon the Action *already* depending.

Of this, there are many Inſtances. In a Writ of * *Account*, the firſt Judgment is, "*quod computet:*" And on ſuch Account, all Articles of Account, though incurred ſince the Writ, ſhall be included, and the Whole brought *down to the Time* when the Auditors make an End of their Account. So in the ancient Writ of *Annuity*; Intermediate Sums grown due pending the Action, ſhall be *included* in the Judgment; becauſe a new Action can not be brought for them. * See *New Abridgment of the Law*, Vol. 1. pa. 21. (very ſhort and clear.)

On the Statute of *Glouceſter* 6 *Ed.* 1. (Whereby Damages are given in real Actions, on a Writ of Entry to recover the ſpecific Lands;) That Statute gives Damages *generally*, without ſaying *till* what Time: Yet the Conſtruction upon it

* P. 1087. * *V.* 2 *Inſt.* 288.

* it has been, "That they ſhall compute *All* the Damages that have ariſen, *pendentè Brevi.*" *

When a *new* Action *may* be *brought*, and a *Satisfaction obtained thereupon*, for any Duties or Demands which have ariſen ſince the Commencement of the depending Suit; *that* Duty or Demand ſhall *not* be included in the Judgment upon the former Action. As in *Covenant* for Non-Payment of Rent, or of an Annuity payable at different Times, You may bring a *new* Action *toties quoties*, as often as the reſpective Sums become due and payable. So in *Treſpaſs*, and in *Tort*; New Actions may be brought, as often as new Injuries and Wrongs are repeated: And therefore Damages ſhall be aſſeſſed only up to the Time of the Wrong complained of.

But where a Man brings an Action of *Aſſumpſit*, for Principal and Intereſt, upon a Contract obliging the Defendant to pay ſuch Principal Money *with Intereſt* from ſuch a Time; He complains of the Non-Payment of *Both:* The *Intereſt* is an *Acceſſary* to the Principal; And He can *not* bring a *new* Action for any Intereſt grown due *between* the Commencement of his Action, and the Judgment in it.

Here, the Plaintiff can *not* bring a *new* Action for the *Intereſt:* For He has *already* had a Satisfaction upon the Defendant's PROMISE.

The Court of *Chancery* has, in Caſes of this Kind, often a *concurrent* Juriſdiction with the Courts of *Common* Law, on Account of Aſſets; (*not* an extraordinary, but an ordinary Juriſdiction, by reaſon of the Fund.) And it ſeems abſurd, that two Courts of Juſtice who have concurrent Juriſdiction, ſhould go by *different Rules:* They ought to act *uniformly*, as far as may be. The Court of Chancery follows the Eccleſiaſtical Court, in Caſes where they have concurrent Juriſdiction. Now in *Chancery*, Intereſt is computed even *up to the Day* when it is conjectured or agreed that the Maſter's Report will be *confirmed*, (though a *future* Day) which they fix according to probable Conjecture. I don't know of *any* Court, in *any* Country, (and I have looked into the Matter) which don't carry Intereſt down to the Time of the *laſt Act* by which the Sum is liquidated.

Why then may not *Juries* compute Intereſt to the Time of the Verdict, or even till the End of 4 Days within the next Term; (before which Time the Plaintiff can not ſign his Judgment.)

I think I can ſee how this Miſtake has happened: I dare ſay that Aſſociates have not diſtinguiſhed between this Species

*cies of Action, (it being called an Action of TRESPASS on the Case,) and ‡ *common* Actions of *Treſpaſs*; (ſuch as Actions for Aſſaults, Batteries, falſe Impriſonments, *&c.*) *P. 1088. ‡ See the Diſtinction between theſe, in the Caſe of *Haward* v. *Bankes*, in this Term, *poſt. pa.* 1114.

Carrying down the Intereſt does a Plaintiff *complete Juſtice*. It is agreeable to the Principles of the Common Law, and interferes with no Statute. It takes from Defendants the Temptation to make Uſe of all the unjuſt Dilatories of Chicane. For, if Intereſt is to ſtop at the *Commencement* of the Suit; where a Sum is large, the Defendant may gain by protracting the Cauſe in the moſt expenſive and vexatious Manner; And the more the Plaintiff is injured, the leſs He will be relieved.

Here, the Jury having left the Matter quite open to Us, We can bring the Intereſt down to the Time of the Liquidation and Aſcertainment of the Sum really due from the Defendant to the Plaintiff; which is the Time of *giving the Judgment*. And the Sum, (a Trifle indeed in this Caſe,) for which the Judgment is to be entered, will then be about 375*l.* (a little more or leſs.) Therefore let Judgment be entered for that Sum.

RULE—That "the *Poſtea* be forthwith delivered to the "Plaintiff's Attorney; and that the Plaintiff ſhall be "at Liberty to enter up Judgment on the Verdict ob- "tained in this Cauſe: But it is further Ordered That "ſuch Judgment ſhall only ſtand Security to the "Plaintiff for the Sum of 375*l.* Parcel of the Sum "of 672*l.* (the Damages aſſeſſed by the Jury;) And "the Plaintiff's Coſts to be taxed by Mr. *Owen*."

☞ This being GRAND-JURY Day, It was intended by the Sheriff, and preſſed by the two Knights of the Shire for *Middleſex*, that *All* the Principal Gentlemen of the County, (not fewer than *fourſcore* in Number) ſhould be *ſworn* of this Grand Jury, in order to their being included in an Addreſs to his Majeſty, from and in the Name of the Grand Jury of *Middleſex*, upon his Acceſſion to the Crown. But, upon the Sheriff's Mention of this to Me, it ſeemed to Me to be irregular and improper to ſwear more than 23: Becauſe if a Number amounting to *two full Juries* or more ſhould be ſworn, it might happen that a *Complete Jury of Twelve* might find a Bill to be a *true* One, though *other Twelve* or even many more than twelve of the very ſame Jury might reject it as an *untrue* One; which would be inconvenient as well as contradictory, and even ſomewhat abſurd and ridiculous. *Thurſday* 20th *November* 1760.

Lord MANSFIELD, upon being apprized of this, ſaid It would be monſtrous to ſwear Fourſcore; And that the Officer could not properly ſwear more than *three and twenty*.

Goodtitle,

*P. 1089. *Friday* 21ſt *November* 1760.

* Goodtitle, ex dimiſſ. Paul, Eſq; *verſ.* Paul, Spinſter.

UPON the Trial of an Ejectment before Lord *Mansfield* at *Hertford* Aſſizes, a Caſe was reſerved for the Opinion of the Court: And the ſingle Queſtion, was "Whether certain Woodlands *paſſed*, by the *Will* of the late "Dr. *Paul*, to his Widow; or *deſcended* to his Son and "Heir, as *undeviſed*."

The Ejectment was brought by the Son for the Recovery of them; by the Deſcription of "twenty Acres of "*Woodland* in the Pariſh of *Bovington* in the County of "*Hertford*."

The Subſtance of the Caſe ſtated was, that Dr. *Paul* being ſeiſed of divers Freehold and Copyhold Eſtates, and (among others) of the Premiſſes in queſtion, made his Will, dated 4th *October* 1752, in Manner following: As to my *Worldly Eſtate*, I diſpoſe of it in Manner following—— Then He leaves Fortunes to his two Daughters; and 20*l.* *to his Son George*, (the Leſſor of the Plaintiff, who was his *only Son and Heir*,) for Mourning. He then gives all his Stocks, Securities &c, &c, to his Wife. Then the Will proceeds thus—"Whereas I am intitled to a Leaſe-hold Eſtate, "being a Houſe and Yard in *Ave Mary Lane*, I give the "ſame to my dear Wife. I have purchaſed a Barn and "Field, in Reverſion expectant on the Death of Lady *Williams*, of Mr. *Ralph Day*: I give and deviſe the ſame to "my dear Wife, ſubject to her ſole Diſpoſal. I give deviſe "and bequeath my two Farms purchaſed of the Truſtees "of his late Grace of *Chandos*, in the Pariſh of *Little* "*Stanmore*, One in the Occupation of *Henry Grub*, the "other in the Occupation (lately) of Mr. *Fully*, to my dear "Wife; ſubject to her Diſpoſal by Will, or by Deed or "Sale. I give deviſe and bequeath my Eſtate in *Fleet*-"*Street*, conſiſting of Houſes in *Johnſon's Court*, *Boars*-"*head Court*, the *Bolt and Tun Inn*, and *Bolt and Tun Paſ*-"*ſage*, to my dear Wife; with all the Right and Property "of enjoying them; And alſo my Eſtate in *Saint Mary* "*Axe*, in the Occupation of Mr. *Jacob Caſtre*, in as full "and ample a Manner as I enjoy the ſame. I give deviſe "and bequeath my Freehold and Copyhold Eſtate in the "Pariſh of *Aldenham*, in the Tenure of *John Wrench*, and "my Freehold Houſe and Orchard in the Back Lane of "*Buſhey*, to my dear Wife; ſubject to her ſole Diſpoſal, "by Will Deed or Sale; As alſo my Copyhold Lands in "*Shedlington* in *Bedfordſhire*. I give deviſe and bequeath "my Dwelling-houſe and the Lands therewith held, in "*Buſhey*, and the Farm in the Tenure of *John Staines*, to-

"gether

" * gether with my Blackſmith's Shop in the Tenure of * P. 1090.
" *James Wilking*, and the little Houſe adjoining, to my
" dear Wife, in as full and ample Manner as I enjoy the
" ſame, and ſubject to her Diſpoſal as effectually as I have
" Power to give. I alſo give my dear Wife my Eſtate at
" *Chain Gate* in *Southwarke*, conveyed from my Daughter
" *Valentia Snow*. I give and deviſe to my *dear Wife my*
" FARM *at Bovington in the* TENURE *of* JOHN SMITH,
" ſubject to her Diſpoſal in as full and abſolute a Manner as
" I could diſpoſe of the ſame if living. Laſtly, I make my
" dear Wife *Suſannah Paul* my ſole Executrix; And give
" deviſe and grant to her and her Heirs All my Eſtate Real
" and Perſonal, Freehold and Copyhold, mentioned in this
" my Will: And I give Her full Power to ſell give or grant
" the ſame in Fee-Simple, in as ample a Manner as I could
" do if living. I wrote this with my own Hands; being
" in good Health."

That in the Year 1718 *Jonathan Hammond*, as Heir to his Father, was admitted to the *Farm at Bovington* in the above Will mentioned; for which *One* Quit-Rent was reſerved, and *One* Heriot: And his Admiſſion is as follows; *viz.* " Ad Curiam Baron' Henſhaw Halſey Arm' Domini
" Manerij præd', ibidem tent' diebus Martis et Mercurij viz.
" decimo et undecimo diebus Junij anno Regni Domini
" noſtri Georgij D. G. M. Br. Fr. et Hiberniæ Regis F. D.
" &c, quarto, Annoq; Domini 1718, coram Carolo Pultney Armigero tunc Seneſchallo ibidem. Ad hanc Cur'
" Præſentum eſt per Homagium, quod Jonathan Hammond alias Cooper, Senior, de Great Marlow in Com'
" Bucks, Generoſus unus Cuſtomar' Tenent' hujus Manerij, Qui de Domino Maner' præd' tenuit ſibi et Hæredibus
" ſuis, per Copiam Rotulorum hujus Curiæ, Unum Meſſuagium ſive Tenementum et *Firmam* tent. per copiam Rotulorum, in Parochis de Bovendon, vocat' *Great Shantocks*,
" per annualem Reddit' 3*l*. 6*s*. 2*d* ½ obiit inde ſeiſitus: Ratione inde accidit Domino pro Heriotto, Unus equus
" Valoris 6*l*. 5*s*. Et quod Jonathan Hammond alias Cooper,
" de Great Marlow præd' Generoſus, eſt ejus Filius et Hæres, et plenæ Ætatis: Qui quidem Jonathan Hammond
" alias Cooper, preſens hic in Curia, petit à Domino Manerij præd' ſe admitti Tenent' ad Prænniſſ. prædict' cum
" eorum pertinentiis. Cui Dominus prædictus, per Seneſchallum ſuum, conceſſit inde Seiſinam per Virgam; Habend' et Tenend' premiſſa præd' cum eorum Pertinentiis
" præfato Jonathan Hammond alias Cooper Hæred' et Aſſign' ſuis imperpetuum, per Virgam, ad Voluntatem Domini, ſecund' Conſuetudinem Manerij præd', per annualem
" Reddit' 3*l*. 6*s*. 2*d* ½ et alia Servitia inde prius debit' et de
" jure Conſuet': Deditq; Domino pro Fine pro tali Statu ſic
" inde habend' 1*l*. 13*s*. 1*d* ½; et admiſſus eſt inde Tenens, et
" fecit Domino fidelitatem."

That

*P. 1091. * That the ſaid *Jonathan Hammond* kept the WHOLE of the Eſtate to which He was ſo admitted, in his *own Hands*, till the 19th of *March*, 1719; and then by Leaſe of that Date, *demiſed* to *William Smith* and *John Smith* his Son, All that Meſſuage or Tenement and Farm, with all and every the Cloſes, Fields, Pieces and Parcels of Arable Land Lay Meadow and Paſture-Ground, with their Appurtenances thereto belonging or appertaining, ſituate lying and being in the Pariſh of *Bovingdon* in the County of *Hertford*, and which ſaid Meſſuage or Tenement and Farm is commonly called or known by the Name of *Great Shantocks Farm*, and is now in the Poſſeſſion of *John Harding* his Under-Tenants or Aſſigns, or by whatſoever other Name or Names the ſame now is or hath been called or known; And alſo all Houſes Out-houſes Edifices Buildings Barns Stables Yards Orchards Gardens Backſides Ways Waters Common Profits and Commodities Hereditaments and Appurtenances whatſoever to the ſaid intended to be hereby deviſed Meſſuage or Tenement and Farm Lands and Premiſſes belonging or appertaining or therewith letten or enjoyed or accepted or taken as Part or Parcel thereof; EXCEPT and always reſerved out of the ſaid Demiſe, unto the ſaid *Jonathan Hammond* his Heirs and Aſſigns, *all and all Manner of* WOOD, WOOD GROUND, HEDGE-ROWS, TIMBER, *and* TREES whaſoever, with the *Lops Tops* and *Shrowds* of the ſame, (other than the Lops of Pollard-Trees, and other than Fruit-Trees for their Fruit only,) now ſtanding or growing or being, or which ſhall at any Time or Times hereafter ſtand grow or be in or upon the demiſed Premiſſes or any Part thereof; with free Liberty of *Ingreſs Egreſs* and *Regreſs* to and for the ſaid *Jonathan Hammond* his Heirs and Aſſigns, with Workmen Servants Horſes Carts and Carriages, at all ſeaſonable Times, to fell ſell cut down hew out have take carry away and diſpoſe of the ſaid Wood Under-wood Hedge-rows timber and Trees at their Pleaſure, doing no wilful Spoi or Damage to the ſaid *William Smith* and *John Smith* their Executors Adminiſtrators or Aſſigns, their ſtanding Corn or mowing Graſs: To hold the ſaid Meſſuage or Tenement and Farm Arable Land Lay Meadow and Paſture Grounds, EXCEPT *before excepted*, unto the ſaid *William Smith* and *John Smith* their Executors Adminiſtrators and Aſſigns from the Feaſt-day of St. *Michael* the Archangel then next enſuing, for 3 Years at 85 *l. per Annum*,

That in the Year 1721, Dr. *Paul* purchaſed from the ſaid *Jonathan Hammond* All the Premiſſes to which the ſaid *Jonathan Hammond* had been admitted as aforeſaid; of which Premiſſes a *Plan* had been made in the Year 1719; which, after the Purchaſe, was hung up by Dr. *Paul* in his Hall. That this Plan was intitled, " An exact " Draught of the *Eſtate or Farm* of Dr *George Paul*, " *called Shantacks*, lying in the Pariſh of *Bovingdon* in the " County

" * County of *Hertford*, about 3 Miles East from *Cheſham*, * P. 1092.
" 4 South from *Berkhamſtead*, 4 South-West from *Hemp-*
" *ſtead*, and about 22 North-West from *London*; contain-
" ing

	A	R	P
" Arable	171	2	12
" Wood	20	0	30"
"	191	3	2"

That *William Smith*, the Father, and *John Smith*, the Son, without any new Leaſe, enjoyed what had been ſo demiſed by the ſaid *Jonathan Hammond*: And *Dr. Paul* kept in his OWN HANDS, *till the Time of his Death*, the *Premiſes* EXCEPTED; Which conſiſt of *Hedge-Rows* which in ſome Places are 3 Poles thick, and in others leſs and only two; and of *Chalk Dells* where Wood has grown up after the Chalk has been taken away, entirely ſurrounded by the Lands in the Tenure of the Tenant; and alſo of ONE ENTIRE WOOD of *Six* Acres, entirely incloſed by the Lands in the Tenure of the Tenant or by the Lands of other Perſons.

The Queſtion is, " Whether the *Premiſes ſo* EXCEPTED " in the Leaſe to *Smith* and ſo *occupied by* Dr. PAUL HIM-" SELF at the Time of making his Will, were by ſuch " Will DEVISED *to his Widow.*

Mr. *Eliab Harvey* was of Counſel for the Plaintiff, the Heir at Law; And argued that the WOODS which were EXCEPTED *out of the Leaſe* from Mr. *Jonathan Hammond* to *William Smith* and *John Smith*, and were *occupied by Dr. Paul Himſelf*, did NOT *paſs* to the Widow, by this Will; but DESCENDED to the Plaintiff, his Son and Heir, as being *un*-deviſed at all.

He urged, that the Plaintiff's Caſe was intitled to a *favourable* Conſtruction; as he appears to be an only Son and *Heir at Law*, diſinherited by his Father, without any apparent Reaſon, (perhaps from Caprice only) And therefore mere *preſumptive* Arguments ought not to hurt Him.

He obſerved, that the Words of this Deviſe are " I give " to my Wife my Farm at *Bovingdon* in the Tenure of *John* " *Smith*:" But the Teſtator does not ſay, " ALL my Farm " at *Bovingdon*;" nor does he expreſs it—" AND in the " Tenure of *John Smith*." 'Tis only " *my* Farm at *Bovingdon in the Tenure of J. S.*" The Court will not, in Prejudice to the Heir at Law, *reject* thoſe Words " *in the Te-* " *nure of J. S.*" which makes the *Deſcription* of what the Teſtator meant to deviſe to his Wife: For the Expreſſion in the firſt Part of the Will is not certain but doubtful.

He

* P. 1093. § P. 102, 107.

* He cited *Bacon's* § *Maxims of the Law*; *Cro. Jac.* 21. *Tuttesham* v. *Roberts*. *Cro. Car.* 129. *Chamberlaine* v. *Turner*. *Plowd.* 191. *b*. *Wrotesley* v. *Adams*; and *Shaw* v. *Bull*, *Cases in B. R. temp. W.* 3. *Pa.* 592. and prayed to have the *Postea* delivered to the Plaintiff.

Mr. *Thomas Clerk* (of *Lincolns Inn*) was for the Defendant: But the Court saved him the Trouble of speaking.

LORD MANSFIELD—This is too plain a Case, to need any Thing to be said on the Defendant's Side.

I never deny making a Case for the Opinion of the Court, whenever it is asked of me, by the Counsel for either Party, at *Nisi prius*; provided that the Case be set down to be argued within Four Days. But I did and still do think the present Case to be a very plain one.

I am sorry that Dr. *Paul* has not thought fit to make a better Provision for his only Son: But He certainly meant and intended to give ALL his Estate to his *Wife*. He not only expresses this Intention as to all his Estates Freehold and Copyhold, *generally*; but he likewise enumerates the *Particulars*: He gives them All to Her, *absolutely*; And He likewise gives Her a Power to dispose of them in as full and ample a Manner as He himself could do, if living. He puts into his Will, All possible Words that can give *Every Thing* to Her.

† *V. Plowd.* 191. *b. Wrotesley* v. *Adams accord'*.

The Question turns only upon the DESCRIPTION of the Thing meant to be here given. The Words "*In the* "*Tenure of John Smith*" cannot be understood as a *Restriction*: They are an *additional* Description which will † *not vitiate* any Thing that is sufficiently described before. He had before given Her "*his Farm at Bovingdon*;" (Which had gone at *One Rent*, and had been used and passed as *One entire Thing*; and for which, *One entire Quit-Rent* had been paid;) And he adds, as a *further* Description, That it was "in the Tenure of *John Smith*."

What was *not in Lease to Smith*, is to be considered in two Lights; *viz Hedge-Row Trees, and Chalk-Dell Trees*; and also *Six Acres of Wood*.

But the *Hedge-Rows* and *Chalk-Dells* themselves *are actually in the Tenure of John Smith*; though the *Trees* are excepted.

As to the Six Acres of *Wood-land*—Indeed the *Soil* is excepted out of *Smith's* Lease, as well as the *Trees*. But Dr. *Paul* gives,

* gives his Wife a Power to diſpoſe of the *Farm* in as full and abſolute a Manner *as He himſelf* could diſpoſe of the ſame, if living: And He himſelf might certainly diſpoſe of the Soil of theſe Six Acres. * P. 1094.

It is manifeſtly intended, that the *whole* Farm ſhould paſs by this Will: And the Teſtator never thought of any *Reſtriction* of his Deviſe, but meant theſe Words "in the Te-"nure of *J. S.*"—only as an *additional* and fuller Deſcription of a Thing ſufficiently aſcertained before.

Mr. Juſt. DENISON concurred, that the Teſtator's Intention certainly was, to deviſe the *Whole* Farm to his Wife; And that He never thought of the Exception of the *Wood-Lands*, nor intended to *reſtrain* the Deviſe; And that the Words "*in the* TENURE *of J. S.*" are only an *additional* Deſcription.

Mr. Juſt. WILMOT was of the ſame Opinion: And He likewiſe thought it a clear Caſe. The Teſtator meant this as an *Additional* Deſcription, and *not* as a *Reſtriction*. He certainly did not intend to die *inteſtate*, as to *any* Part of his Eſtate. The Words—"in the *Tenure of J. S.*" are *not* to be conſidered as Words of *Limitation* or *Reſtraint*. "My "Farm at *Bovington*," is, "*All* my Farm at *B.*" If the Teſtator had meant otherwiſe, He would have *ſpecified* that Part of it which He meant to *exclude* and *except* out of this Deviſe: But this Deviſe of the Farm is tantamount to his deviſing it by the ſpecific Name of *Shanticks Farm*. The *Nature* of the Property ſhews it. The very Exceptions in the Leaſe indicate that it was intended to keep theſe excepted Parts *connected* with the farm, and *not ſevered* from it. And the Teſtator could never mean to give Mrs. *Paul* the Lops and Maſt of the Pollards, and the Fruit of the Fruit-Trees, and not the Trees themſelves. And yet She would, upon this Will, be intitled to *theſe*; as appears fully in *Richard Liford's* Caſe, 11 *Co.* 48.

Per Cur unanimouſly.
Let there be JUDGMENT for the DEFENDANT.

Bodily *verſ.* Bellamy.

Saturday 22d November 1760.

MR. *Norton*, on Behalf of the Plaintiff, ſhewed Cauſe againſt a Rule which had been obtained by Mr *Morton*, (of Counſel for the Defendant,) "For the Plaintiff to "ſhew Cauſe why, upon Payment of the WHOLE PENAL-"TY of the Bond, together with all the *Coſts in this Court*, "and alſo the *Coſts of the Writ of Error* brought upon the "Judgment given by this Court, the Execution ſhould not "be *ſtayed*, and *Satisfaction entered* upon the Record."

The

*P. 1095. * The Caſe was very *particular*.

It was an Action brought here, in this Court, upon a *Bond* given at *Calcutta* (in *Bengal)* in the EAST INDIES, where both Parties then reſided, and where the Plaintiff ſtill reſides; but the Defendant is in *England:* At which Place *(Calcutta)* the allowed Intereſt is 9*l. per Cent*; Which is the Rate payable by the Condition of the Bond on which the preſent Action was brought.

The *Declaration* was in Debt, for 1546*l.* 14*s.* 6*d.* It contained *two* Counts. One was upon the *Bond*, for the *Penalty* of 9165 Rupees of *Calcutta*, of the Value of 1031*l.* 3*s.* of lawful Money of *Great Britain:* The Other was upon a *Mutuatus*, for 4582 Rupees, of the Value of 515*l.* 11*s.* 6*d.* (Reſidue of the ſaid Sum of 1546*l.* 14*s.* 6*d.)* The Plaintiff laid his Damage at 10*l.*

The Plea was, "*Non eſt factum*," as to the 1ſt Count; And "*Nil debet*," as to the 2d. The Action was brought in 1756: And the Cauſe was tried before Ld. *Mansfield*, in *Michaelmas* Term 1759.

Upon the Trial, the BOND was *proved:* But *no Evidence* at all was given upon the 2d Count, of any Money *lent* to the Defendant; Nor had he, in Fact, borrowed any *other* Money of the Plaintiff, than the very Sum for which He gave the Bond. Notwithſtanding which, the Verdict was taken (through Miſtake, or Inadvertency) for the Plaintiff *generally*, upon BOTH Counts; And the Judgment was entered accordingly, and remained unimpeached.

At the *Time* of the Judgment, the *Penalty* of the Bond was *ſufficient* to have anſwered the *Whole* of the Debt, Intereſt, and Coſts *then* incurred.

But the Defendant had affected very great *Delay*, in various Methods. He had brought a Bill in Equity for an Injunction; and had taken Exceptions to the Anſwer; And hindered the getting the Injunction diſſolved, till *Hilary* Term 1759; When (after arguing the Exceptions) it was diſſolved on the Merits. He then immediately brought a Writ of Error in the Exchequer Chamber, merely for Delay; and aſſigned the Common Errors. Then He pleaded "*Nul tiel Record*" to the *Scire facias* upon the Judgment. So that he prevented the Plaintiff from ſigning his final Judgment, till the 13th Day of this very Month (9 Days ago)

Theſe Delays having coſt much Time and Money too (as the Coſts taxed always fall ſhort of the Coſts out of Pocket,) and the Intereſt running on: The Caſe was ſo altered, that at *this* Time, the PENALTY of the Bond *alone* was become *inſufficient*,

* *inſufficient*, (by about 150*l*) to anſwer the Total of the Debt Intereſt and Coſts *now* incurred. * P. 1096.

It was therefore inſiſted by Mr. *Norton*, on Behalf of the Plaintiff, That the Court would not interfere to give their Aſſiſtance to the Defendant *contrary* to the plain clear obvious JUSTICE of the Caſe. He admitted that if no Evidence was given at the Trial, on the ſecond Count of any Money borrowed by the Defendant of the Plaintiff, there ſhould indeed have been a Verdict taken for the *Defendant*, upon *that* Count; and it was a Miſtake to neglect it: But he is *too late* to complain of that Miſtake *now*. If he had complained in *proper* Time, the Penalty of the Bond would *then* have anſwered the Plaintiff's whole Demand at that Time due to him: But as the Defendant had *wilfully and obſtinately delayed* the Plaintiff, till the Caſe is much otherwiſe, He has no Pretence to apply to the Court to ſtop the Plaintiff's taking out his Execution upon the Judgment as it now ſtands.

Lord MANSFIELD—It is admitted that there is a Miſtake in the Taking this Verdict; and, conſequently, in the Judgment. It may be proper then, firſt to conſider "What is "the fair honeſt Juſtice of the Caſe;" and "whether the "Plaintiff cannot come at it, *although* this Miſtake ſhould "be rectified." *If* he can, it is to no Purpoſe for the Defendant to deſire it to be *rectified*: His wiſeſt way will be, to make Satisfaction immediately, without more Expence.

The Plaintiff don't inſiſt to avail Himſelf of the Miſtake in the Verdict and Judgment, *beyond* his *juſt* Demand.

The Plaintiff is *in Juſtice* intitled to recover the Sum *really lent* to the Defendant, together with INDIAN *Intereſt* till the Signing of the *Judgment*; but with only the legal Intereſt of *this* Country (which is no more than Five *per Cent.*) from the Time of the *Liquidation* of the Debt by the Judgment.

The Plaintiff having been kept out of his Money by a Writ of Error brought after a Verdict, is intitled to a Satisfaction for this Damage, *under the Statute* of * *Car.* 2; which obliges the Plaintiff in Error to give Security as well for Damages as Coſts: Or He may bring an Action of *Debt on the Judgment*, and have Damages *pro detentione Debiti*. * *V.* 13 *Car.* 2. *Stat.* 2. *c.* 2. § 8, 9, 10.

There are four Courts, (all included under the ſame Act of Parliament,) to which Writs of Error may be made returnable; namely, the Houſe of Lords; The Court holden before the Lord Chancellor and Treaſurer and Judges (under

* P. 1097.

der 31 *Ed.* 3.) for examining erroneous Judgments in the Exchequer; The Court of Exchequer Chamber holden before the Judges of the Common Pleas and Barons of the Exchequer (under 27 *Eliz. c.* 8.) for examining into Errors in the Judgments of * this Court: And this Court itself, for correcting the Errors of the King's Bench in *Ireland*, Common Pleas here, and other Courts.

* *N.B.* This is confined to Causes *not commencing here by Original*: For where the Action commences in this Court *by Original*, the Writ of Error is returnable in *Parliament*.

In the first of these, (the House of Lords,) they give sometimes very large, sometimes very small Costs, in their *Discretion*, according to the Nature of the Case and the Reasonableness or Unreasonableness of litigating the Judgment of the Court below.

In the second, It is done by the Lord Chancellor or Lord Keeper personally: And the Practice is, To give Interest from the Day of signing the Judgment to the Day of affirming it there; computed according to the *current*, *not* according to the strictly *legal* Rate of Interest.

In the third, (the Exchequer-Chamber) the Course is, for the *Officer* to settle it, unless any particular Direction be given by the Court: And He, in taxing the Costs, allows double the Money out of Pocket, or thereabouts; but adds no Interest.

In *this* Court, upon Writs of Error from *C. B. &c.* the *Officer* taxes the Costs of Affirmance; and taxes them in the same Manner as he taxes other Costs, though somewhat more liberally; but *Our Officer* never has any Regard to Interest, nor allows it as of Course. *The* COURT themselves have sometimes indeed ordered Interest to be computed on the Sum liquidated by the Judgment below. *One* Instance of this was in the Case of the *Bishop of London and Lewen*, against *the Mercers Company*, and is mentioned in 2 *Strange* 931. That was a Writ of Error upon a *Quare Impedit*; And the Judgment below was for 70*l* for half a Year's Value of the Church, and for a Writ to the Bishop: Which Judgment having been affirmed here, the Defendants in Error moved, in *Easter* Term 5 *G.* 2. for Costs and Damages on 3 *H* 7. *c.* 10. And they would have had the Damages computed according to the Value of the Church, during the Time of their being kept out of their Presentation. The Court, after Deliberation, agreed that it was in their DISCRETION, to settle the *Quantum* of Damages. But They did not think it right, to give Damages to the *Patron*, in Proportion to the Profits of the Benefice; because He himself would not have been intitled to receive them. They declared therefore that the *Measure* they went by, was the *Interest* of the Money recovered, the legal Interest from the Time of bringing the Writ of Error to the Time of affirming the Judgment. And they directed the Master to compute

* pute the Damages accordingly, *viz.* legal Intereſt upon the 70*l.* recovered; and to add it to the Coſts. * P. 1098.

So here, in the preſent Caſe, Intereſt ought to be paid after the Rate of 9 *per Cent.* according to the *Indian* Allowance, *till* the Aſcertainment of the Sum to be paid, by *ſigning the Judgment*; and *from that* Time, till the *actual Payment* of the Money, after the Rate of 5 *per Cent.* only, upon the accumulated Sum aſcertained by the Judgment: For *that* is the real *Damage* which the Plaintiff has ſuſtained by the Delay of his Execution and the Detention of his Debt.

The *Juſtice* of the Caſe is plain: And the *Law* is agreeable to it.

Mr. *Morton* agreed that his Client, the Defendant, had better acquieſce in paying the Plaintiff what was *juſtly* and *fairly* due to Him, voluntarily and without further Litigation, than to render Himſelf liable to the Coſts of another Action.

Wherefore He *gave up* his preſent Motion: And no Rule was taken upon it.

Bondfield, qui tam &c, *verſ.* Milner.

IN a *qui tam* Action, for Uſury, Mr. *Stowe* ſhewed Cauſe againſt making abſolute a Rule of Mr. *Yates*'s, for diſcharging a Rule which had been before obtained by Mr. *Stowe* Himſelf, for AMENDING THE DECLARATION, in altering the *Date* of the Note; (all being *in Paper.*) He cited *Griffith, qui tam &c* v. *Hollyer, Trin.* 29, 30 *G.* 2 *B. R.* Where the Plaintiff had Leave to amend his Declaration, by laying the *Venue* at *Alceſter* in *Warwickſhire*, inſtead of *Woodſtock* in *Oxfordſhire*: And the Court were clear "that "it might be done at any Time whilſt the Proceedings were "in Paper:" And Mr. Juſtice DENISON declared and repeated "that it was an Amendment at *Common* Law."

Mr. *Norton*, and Mr *Yates*, *contra*—The laſt Day of laſt Term this Motion was * *denied* to Mr. *Stowe*. Here is *Iſſue joined*, and entered on the Roll; And *many Terms* have elapſed ſince the Commencement of this Action: And the Amendment propoſed is to vary the Count, to add a *new* Count, which is a new kind of Action; For it is to *alter the Date* of the Notes.

* *Hodſon, qui tam &c, v. Milner, Trin.* 1760. (a Caſe very like this; though not preciſelyth ſame.)

The *Statutes* do not extend to *penal* Actions: And at *Common* Law, they come late.

*P. 1099. ‡ 2 *Mod.* 144. † *Hodgſon, qui tam &c.* v. *Milner, Trin.* 1760.

* In Sir *William Turner*'s Caſe, ‡ it is not allowed *after Iſſue joined:* And Mr. *Stowe*'s former Rule was † *diſcharged* on that Authority, upon Mr. *Altham*'s Motion.

Lord MANSFIELD—The Rule is, "That whilſt All is "*in Paper*, You may amend." Here, he has only miſtaken the *Date*. In the *Exchequer*, they amend *penal* Informations. To be ſure, the STATUTES of Amendment do not extend to *penal* Actions. This is an Amendment at *Common* Law.

Mr. Juſt. DENISON—There is no Difference between *Civil* and *Penal* Actions; where they apply as for an Amendment at *Common* Law, and All is *in Paper*.

§ *Per. Cur.* unanimouſly,
Mr. *Yates*'s Rule, to ſhew Cauſe "Why upon Payment "of the Plaintiff's Coſts of making the former Rule "of laſt Term abſolute, together with the Coſts of "this Application, the ſaid former Rule (of *Wedneſ-*"*day prox. poſt tres Trin.*) ſhould not be diſcharged," was now itſelf DISCHARGED.

§ Note—The preſent Reſolution (though Contrary to Sir *William Turner*'s Caſe) is agreeable to many later Determinations; particularly, to *D'Oyley* v. *Daniel*, *Tr.* 1732. 5, 6 *G.* 2. *Strode* v. *Tilly*, *H.* 15 *G.* 2. *Rivet* v. *Chelmeley*, *H.* 17 *G.* 2. *Hallet* v. *Hallet*, *Tr.* 21 *G.* 2. and *Griffith* v. *Hollier*, *Tr.* 1756: All which were *qui tam* Actions, and all in this Court. (*Hodſon qui tam* v. *Milner* was in the Hurry of the laſt Day of a Term; and only two Judges in Court.)

Monday 24th *November* 1760.

Sir William Yea *verſ.* Fouraker.

IN an Action upon a Promiſſory Note, tried before Mr. Juſt. *Noel* upon the Weſtern Circuit. It was there ruled by Him, and confirmed by this Court, without Argument, upon a Motion here for a New Trial, "That an Acknow-"ledgment of the Debt, *after* the Commencement of the "Action, takes it *out* of the *Statute of Limitations*."

Rex *verſ.* Peter Wright, Robert Voſs, et al'.

ON the Motion of Mr. *Norton*, who moved on behalf of the Relations and Friends of one Mrs. *Frances Savage*, a Woman addicted to and almoſt deſtroyed by Liquor, repreſenting that She was in the Hands of very improper Perſons, who were ſuſpected to be uſing Artifices with Her, in order to the obtaining a Will from Her, when ſhe was under very improper Circumſtances of Mind to make One; and was too much under their Influence, even if her Underſtanding

* derſtanding and Memory had been more perfect, and leſs diſordered by intemperate Drinking; A Rule was made upon the Defendants to ſhew Cauſe Why an Information ſhould not be exhibited againſt them for the Miſdemeanors charged in the Affidavits. * P. 1100

It was alſo added to the Rule, *at firſt* (and *without* any Rule to ſhew Cauſe as to this Part of it,) "That *Frank* "*Nichols Dr.* of Phyſic, *Robert Halifax Apothecary*, *Catha-* "*rine Forcer* Widow (who was *Mother in-Law* to Mrs. *Sa-* "*vage*, then a *Widow*) *Thomas Lloyd* Gentleman (*Attorney* "for Mrs. *Forcer*,) *John Little* and *Anne* his Wife (*Relati-* "*ons* to Mrs. *Savage*,) *Margaret Francis*, a *Nurſe*, and "*Jane Francis*, a *Maid-Servant*, ſhould at all proper Times "and ſeaſonable Hours, reſpectively be admitted and have "free Acceſs to the ſaid Mrs. *Frances Savage*, Widow, "Daughter-in-Law of the ſaid *Catharine Forcer*, at the "Dwelling-houſe of the ſaid *Robert Voſs* (One of the De-"fendants) in *Furnival's Inn Court Holbourne*, to conſult "with, adviſe, and aſſiſt the ſaid *Frances Savage*."

N. B. It was repreſented, that She was too infirm and weak, to be brought into Court by an *Habeas Corpus*: (and in Fact, She died the next Day.)

Doe, ex dimiſſ. Long, *verſ.* Laming.

Tueſday 25th November 1760.

THIS was a Special Caſe, which aroſe upon an Ejectment brought for GAVEL-KIND Lands in *Kent*, tried before *Lord Mansfield* at *Niſi prius*.

The Ejectment was brought by the Heir at Law of One *Martin Long*, for an undivided fourth Part of one Meſſuage &c, in the Pariſh of *St. John the Baptiſt* in the Iſle of *Thanet* in *Kent*.

Special Caſe ſtated for the Opinion of the Court—

Martin Long, being ſeized in Fee &c, made his Will &c; and thereby deviſed thus—"I give and deviſe One equal "undivided fourth Part &c, unto my Nephew *Martin Read*, "and to the *Heirs of his Body* lawfully to be begotten, as "well Females as Males, *and to their Heirs and Aſſigns for* "*ever*, to be divided equally, Share and Share alike, as "Tenants in Common and not as Joint tenants. Alſo I "give and deviſe one Other equal undivided fourth Part "&c. unto my *Niece in Law Grace Read*, *Widow* of my "*late Nephew Edward Read deceaſed*; and to the *Heirs of* "*her Body* lawfully begotten, as well Males as Females, and "to *their Heirs and Aſſigns for ever*, to be divided equally "Share and Share alike, as Tenants in Common and not

P. 1101. " as Joint-tenants. Alſo I give and deviſe one Other equal "undivided fourth Part &c, unto *my Niece* ANNE, now "Wife of *William Corniſh*, and to the HEIRS OF HER "BODY lawfully begotten or to be begotten, *as well* FE-"MALES as Males, and TO THEIR HEIRS AND AS-"SIGNS FOR EVER, to be divided *equally* Share and "Share alike, as *Tenants in Common* and not as Joint-tenants. "Alſo I give and deviſe one Other equal undivided fourth "Part, &c, unto my Niece *Sarah* now Wife of *S. Hooper*, "and to the *Heirs Females and Males of her Body* lawfully "begotten or to be begotten, to be divided (as before,) "and *to their Heirs and Aſſigns for ever.*"

There were likewiſe in this Will, other Deviſes of other Eſtates; *viz.* "I give and deviſe unto my Nephew *J.* "*Tickner* his *Heirs and Aſſigns for ever*, All that &c &c." "I give and deviſe my Farm &c, unto my Siſter *Catharine*, "Wife of *William Abbot*, and to her *Aſſigns*, for and dur-"ing the *Term of her natural Life*; and from and after her "Deceaſe, I give the ſame unto my Nephew her Son *Wil-"liam Abbot* and the *Heirs of his Body* lawfully to be be-"gotten, *for ever:* And for want of ſuch *Iſſue*, I give and "deviſe the ſame to the *right Heirs* of Me, for ever."

"And as concerning my Meſſuages &c, I give and de-"viſe the ſame to *Elizabeth Long*, *her Heirs and Aſſigns for* "*ever.*"

"And as concerning &c, I give and deviſe the ſame to "my Siſter *Sarah Tailor* and her *Aſſigns*, during her *natural* "*Life*, provided She keep the ſame in Repair: And from "and after her Deceaſe, I give the ſame to my Siſter *Eli-"zabeth Long* her *Heirs and Aſſigns for ever.*"

"Alſo I give and bequeath to my Niece *Sarah* now Wife "of *William Long*, and to the *Heirs of her Body*, *the Sum of* "150*l.* of like Money to be divided between them equally."

The Teſtator lived two Years after making this Will: He died in *May* 1751.

At the *Time* of making the ſaid Will, the Teſtator's ſaid Niece ANNE CORNISH, Wife of *Thomas Corniſh*, had *two Daughters* (by her ſaid Huſband) then living; *viz.* *Elizabeth* and *Anne*.

ANNE CORNISH, the Teſtator's Niece, died *after* the Time of *Making the Will*; but in the *Life-time of the Teſta-tor:* And her two *Daughters*, *Elizabeth* and *Anne*, *ſurvived* both their ſaid *Mother* and alſo the *Teſtator Martin Long*.

The

* The Whole Premiſſes are *Gavel-kind.* *P. 1102.

The Queſtion ſubmitted to the Court is—"Whether, by "the DEATH of ANNE CORNISH (the Mother) in the "Life-time of the Teſtator, the Deviſe, as to her One "fourth Part, was VOID or LAPSED: Or Whether the "ſaid One fourth Part deviſed as above, or *any* and *what* "*Part* thereof on the Teſtator's Death, DESCENDED to "the Leſſor of the Plaintiff, as *Heir at Law* to the Teſ-"tator."

Mr. *Filmer* Junior, argued this Caſe for the Plaintiff.

He endeavoured to maintain that Either the *Whole* of the One fourth Part deviſed to *Anne Corniſh* was *lapſed* by her dying in the Teſtator's Life-time; Or, at leaſt, that ſome *Part* of it was ſo; and that what was lapſed would conſequently *deſcend* to the Leſſor of the Plaintiff, as Heir at Law to the Teſtator.

ANNE CORNISH, the Teſtator's Niece would have taken, He ſaid, if She had ſurvived the Teſtator, an Eſtate in TAIL *General*; Or, if not ſo, then She muſt have taken *One third* Part of the *Fee Simple*, as Tenant in Common with her two Daughters: If the former, the Whole is lapſed; If the latter, One third only.

But He conceived that She would have taken an Eſtate in *general Tail*, by PURCHASE, under this Deviſe.

The Word "*Heirs*," (in the *plural* Number,) is a Word of *legal Limitation:* And there is no Inſtance, in Caſe of a *mere* LEGAL Eſtate where "*Heirs* of the Body" have been conſtrued to be Words of *Purchaſe*. The Caſe of *Bagſhaw* v. *Spencer* was a TRUST.

The Court will keep to the *legal technical* Interpretation.

The Caſe of *Goodright* v. *Pulleyn et al'*, *M.* 11 *G.* 1. *B. R.* reported in 2 *Ld. Raym.* 1437. is material to this Point.

There was likewiſe a Caſe before the Council, on 18th *March* 1730, at which *Ld. Raymond* and Ld. Ch. J. *Eyre* were Both preſent. It was between *Morris*, on the Demiſe of *William Andrews*, and *Iſaac Le Gay* and *John Wood*; upon an Appeal from *Barbadoes*. It was a Deviſe "to *Lu-*"*cretia*, for Life; then to the *Heirs* of the Body of *Lucre-*"*tia*, and their Heirs; and if She died without ſuch *Heir* "of her Body, then over." This was holden to be an "Eſtate Tail in *Lucretia*."

There

*P. 1103. * There were alſo two late Caſes in Chancery; *viz.* *Wright* v. *Pearſon*, *June* 6*th* 1758, *Trin.* 31 *G.* 2. Where *Thomas Raleigh* was holden to take an Eſtate Tail: (This Caſe was upon a Truſt-Eſtate) The other was *King* v. *Burchell*, 20th *November* 1759, before the Lord Keeper *Henley*. *John Blunt* deviſed to his Wife, for her Life; then to *John Harris*, for Life; then to the *Heir* Male of *John Harris*, and his Heirs; and for want of ſuch Iſſue, then over. *John Harris* was holden to have taken an Eſtate Tail; though there were Words of Limitation over. And Appeal was brought; but afterwards deſerted.

The Word "Heirs," in the *Plural*, with Words of Limitation added to it, has *never* been conſtrued to be a Word of *Purchaſe*: But the Word "Heir," in the *ſingular* has been conſtrued to be a Word of *Limitation*.

An Eſtate *Tail* to *Anne Corniſh* beſt anſwers the apparent *Intention* of the Teſtator.

But if "the Heirs of her Body" are to be here conſtrued as Words of *Purchaſe*; Then *Anne Corniſh and her two Daughters* muſt take an Eſtate in *Fee Simple*, as Tenants in *Common* and not as Joint-tenants; *Each* of them *One third* of the whole One fourth Part; And conſequently, as She was (in *that* Conſtruction of the Deviſe) made Tenant in Common, in *Thirds*, with her two Daughters, but died before the Teſtator; her *One third lapſed* by her Death, and *deſcends* to the Plaintiff as Heir at Law.

Mr. *Thomas Clarke* (of *Lincoln's Inn*) argued for the Defendant.

He propoſed to conſider the Queſtion, under two general Heads; 1ſt, The *Intention* of the Teſtator, to be collected from the whole Will; 2dly. The *Operation of Law*, to effectuate ſuch Intention.

Firſt—The *Intention* of the Teſtator plainly was, "That "*All the Children* of his Niece *Anne Corniſh*, both Sons and "Daughters ſhould *take*; and *they only*:" Though it is not indeed ſo clear, Whether He meant that they ſhould take as Tenants in Common *with* their Mother; or after her Death. He probably meant it as a Deſcription of Heirs in Gavel-kind: But He certainly meant, that they ſhould take *as* Purchasers; and that they ſhould take an Eſtate in *Fee*; and not that *Anne Corniſh* ſhould take an Eſtate Tail.

This Intention is plainly to be collected, He ſaid, from ſeveral other Clauſes in the Will. The ſeveral other Deviſes ſhew, that, by "Heirs of the Body," the Teſtator meant *Children*:

* *Children:* Particularly, the Bequeſt to *Sarah* the Wife of *William Long*, and to the *Heirs of her Body*, of the *Sum of* 150*l.* to be divided between them equally; which can be taken in no other Senſe. And in the Deviſe to *William Abbot* and the Heirs of his Body, He explains his Meaning, by adding "and for want of ſuch *Iſſue*." * P. 1104.

Secondly—The *Operation of Law* will *effectuate* the Intention of the Teſtator, where it is *plain* and *manifeſt*. And here is a plain and manifeſt Intention of the Teſtator, "That "his Deviſees ſhould take by *Purchaſe*, and *not* by Deſcent."

And "Heirs of the Body," (in the *plural*) may be Words of PURCHASE, where the *Intention* of the Teſtator is clear and evident. There is *no* ſuch Diſtinction as that which Mr. *Filmer* has laid down "that where the Words of Limi-"tation are grafted upon the Word Heir in the *ſingular* "Number, that Word ſhall be conſtrued a Word of *Pur-"chaſe*; But where the Words of Limitation are grafted "upon the Word Heirs in the *plural*, that plural Word "Heirs ſhall *always* be conſtrued a Word of *Limitation*."

In the Caſe of * *Bagſhaw* v. *Spencer*, "Heirs of the "Body," were conſtrued to be Words of *Purchaſe*. And in that Caſe, Lord *Hardwicke* mentioned a Caſe of † *Liſle* v. *Gray*; where the Word was *plural*, and the ſame Determination was made: And that Caſe of *Liſle* v. *Gray*, was upon a *Deed*, and at *Common* Law. * *Mich.* 1748. 22 *G.* 2. in *Cane's*. † *V. poſt.*

Law v. *Davis et al'*, ‡ *M.* 3 *G.* 1. *B. R.* was a Deviſe "to "*Benjamin Jevon* and the Heirs of his Body lawfully to be "begotten;" And Words of Limitation were ſuperadded: Yet it was holden to be an Eſtate for Life; not in Tail. ‡ *Fitz-Gibbon* 112, and 2 *Ld. Raym.* 1561.

All the Parts of a Deviſe ought to be taken into the Conſtruction: And the Intention of this Teſtator was, "That "all the Deviſees ſhould here take by Purchaſe." And the Words are ſufficient and apt enough for that Purpoſe. In Proof of his Allegation, He cited 1 *Co.* 95. *Shelley's* Caſe, cited in 1 *Ld. Raym.* 205. by Ld. Ch. J. *Treby*, and confirmed by Him. 1 *Ld. Raym.* 203. *Luddington* v. *Kime:* And *Clerk* v. *Day*, or *Cheeke* v. *Day*, there cited, in *Pa.* 205. ‖ 1 *Inſt.* 26. *b.* Deviſe "to *Roberge*, and to the Heirs of *John Man-devile* "her late Huſband, on her Body begotten," was adjudged only an Eſtate for Life in *Roberge*; And that the Eſtate Tail veſted in her Son; "Heirs of the Body of his "Father," being a *good* Name of *Purchaſe*. ‖ See it alſo in *Viner's Abr.* Tit. *Remainder*, *Pa.* 393. Note on Letter G. *pl.* 7.

If it be objected "That this Intention could not operate "to the Daughters of *Anne Corniſh* as *Heirs* of the Body of "*Anne Corniſh* who was *then living*, (for that Nemo eſt "Hæres *viventis*;") The Caſe of *Burchett* v. *Durdant*, 2 *Ventr.*

*P. 1105. *Ventr.* 211. (which was Six Times determined, under different Names,) is a full Anſwer to that Objection; and ſhews that Perſons *may* take an immediate and veſted Eſtate, under the Denomination of "Heirs of the Body of "a Perſon *living*."

Upon the Whole, The Court will *depart* from the ſtrict Rules of Words of *rigid* legal Limitation, where the *Intention* of the Teſtator is manifeſt: And it is here ſufficiently plain and clear, to induce the Court to do ſo in the preſent Caſe.

N. B. This Argument was begun upon the 21ſt of *November*; from which Day, it was Adjourned to the preſent 25th. And now—

Mr. *Filmer* replied—He denied, that the Teſtator's *Intention* was clear plain and manifeſt; either upon the particular Clauſe in queſtion, or upon the whole Will taken together. The Intention ſuppoſed by Mr. *Clarke* is oppoſite to the Teſtator's plain poſitive Words. The plain Words muſt be adhered to; and the impertinent or inconſiſtent Words, rejected. *Shelley*'s Caſe, 1 *Co.* 89.

But *if* the Intention was clear and plain, yet there is a *Difference* between LEGAL Eſtates, and TRUSTS: In *Bagſhaw* v. *Spencer*, Ld. *Hardwicke made this Diſtinction*; which He founded on the Caſe of *Coulſon* v. *Coulſon*. And even in Chancery, there is a Diſtinction (upon this Point) between what they call a Truſt *executed*, and a Truſt *executory*.

As to the Word "Heirs (in the Plural,) being deſcriptive of the Perſon, although *Nemo eſt Hæres Viventis*—He obſerved that Mr. Juſtice *Forteſcue*, in the Caſe of *Goodright* v. *Pulleyn et al'*, thought that the Word "*his*" [Heirs] would, in grammatical Conſtruction, properly refer to * *Nicholas*.

* See 2 *Ld. Raym.* 1 40.

In all Mr. *Clarke*'s Caſes, except *Law* v. *Davis*, there was a Limitation for Life: And that Caſe ſtands upon its own Circumſtances. The Words "Heirs of the Body" were there explained by the following Words, "*that is to* "*ſay*, to his 1ſt, 2d, 3d, and every other Son and Sons "ſucceſſively &c."

So, in *Liſle* v. *Gray*, "Heirs Male" had a plain Reference to the Four Sons.

The Quotation from *Shelley*'s Caſe, 1 *Co.* 95. *b.* is only a Caſe put by *Anderſon, arguendo*: The *Reſolution* is contrary.

As to *Luddington* v. *Kime*—It only proves That "*Iſſue*" may be a Word of Purchaſe: But it does not prove, That "*Heirs* of the Body," may be ſo.

Upon

* Upon the Whole, *Anne Corniſh* muſt have taken an Eſtate *Tail*; not an Eſtate for her Life only: But, *at leaſt* She was to have taken *One third of the Fee Simple*, as Tenant in *Common* with her two Daughters; For a Deviſe "to *A. et liberis ſuis*, and to their Heirs," is a *Joint Fee* to *All* So is *Co. Lit.* 9. *a.* expreſs: Which is allowed and affirmed in the Caſe of *Oates, on the Demiſe of Elizabeth Hatterley*, v. *Jackſon*, 2 *Strange* 1172. * P. 1106.

Lord MANSFIELD—The Words are—"to my Niece "*A. C.* and to the HEIRS OF HER BODY lawfully be- "gotten or to be begotten, *as well Females* as Males, *and to* "*their Heirs and Aſſigns for ever*; to be divided *equally*, "Share and Share alike, as Tenants in *common*, and not as "Joint-tenants."

The Queſtion is, "Whether it be contrary to the Rules "of Law, to underſtand, in this Caſe, "*Heirs of the Body* "of *A. C.* as a Deſcription of CHILDREN: For that "ſuch was the INTENTION *of the Teſtator*, there can be "little Doubt."

It is to be lamented, that Queſtions of this kind have occaſioned ſo much of Litigation and Expence. The beſt way to ſettle them, is, to reduce the Matter, if poſſible, to ſome *certain Rules*.

It is clear, that where an Eſtate is given to the Anceſtor "*and his Heirs*" (either general or ſpeciail,) the Term denotes the *Quantity* of the Eſtate which the Anceſtor takes; *viz.* either Fee Simple, or Fee Tail.

It is clear too, that a Perſon to take as a Purchaſer, may be deſcribed from *every* Courſe of Deſcent; as Heir at Law, Heir in Borough-Engliſh, Heir or Heir-Male of the Body.

By an ancient Maxim of Law, although the Eſtate be limited to the Anceſtor, *expreſsly* "FOR LIFE, *and after* "*his Death to his Heirs*," (general or ſpecial,) the Heir ſhall take by *Deſcent*, and the Fee ſhall veſt in the *Anceſtor*.

This Maxim was originally introduced in favour of the *Lord*, to prevent being deprived of the Fruits of the Tenure, and likewiſe for the Sake of *Specialty-Creditors*.

The Anceſtor, had the Limitation been conſtrued a contingent Remainder, *might* have *deſtroyed* it for his own Benefit. *If* he did *not* deſtroy it, the Lord would have loſt the Fruits of his Tenure; and the Specialty-Creditors, their Debts. Therefore the Law ſaid, "Be the *Intention* as it "may, where an Eſtate is given to the Anceſtor *and his* "*Heirs*, the *Fee* ſhall *veſt in* HIM."

The

*P. 1107. *The *Reaſon* of this Maxim has long *ceaſed*; becauſe Tenures are now aboliſhed, and Contingent Remainders may be preſerved from being defeated before they come *in Eſſe*: Yet, having become a *Rule of Property*, it is *adhered to* in all Caſes *literally within it*, although the Reaſon has ceaſed. But where there are Circumſtances, which take the Caſe OUT *of the Letter* of this Rule, it is *departed from*, in *favour of the Intention*; becauſe the *Reaſon* of the Rule has *ceaſed*.

In the Caſe of *King* v. *Melling*, (1 *Vent.* 231.) a Caſe was cited by Ld. Ch. J. *Hale*, where a Man deviſed "to his "Eldeſt Son for Life, *et non aliter*; and after his Deceaſe, "to the Sons of his Body:" It was holden to be but an Eſtate for Life, by reaſon of the Words * "ET NON "ALITER." Yet the "*non aliter*" was implied, if it had not been expreſſed: But it ſhewed the *clar Intention* of the Teſtator; and the Conſtruction was made ſo as to *effectuate* that Intention.

* See this cited Caſe diſcuſſed at large, in the Caſe of *Robinſon* v. *Robinſon*, *P.* 1756, 29 *G.* 2. *B. R. ante pa.* 38.

And in a later Caſe of *Backhouſe* v. *Wells*, *M.* and *H.* 12 *Ann.* Where the Deviſe was "to *J. B.* for his *Life* ONLY, "without Impeachment of Waſte; and from and after his "Death, then to the Iſſue Male of his Body lawfully to be "begotten; with Remainder to the Heirs Male of the Body "of that Iſſue;" The whole Court were of Opinion, That the Deviſee, was, by that Deviſe, made Tenant for Life, with Remainder to the Iſſue in Tail. They † held, that the Words "for Life *only*," clearly and expreſsly ſhewed the *Intention* of the Teſtator; and thereby took the Caſe *out* of the General Rule, and turned the Words *commonly* uſed as Words of *Limitation*, into Words of *Purchaſe*.

†*V. Lucas's Rep.* 181 to 184. *Forteſcue's Rep.* 139. and *Abr. of Caſes in Equity* 184. *pl.* 27.

Indeed, ſuch a Conſtruction as this, cannot be made, but in Caſes where it is *agreeable to the clear Intention* of the Teſtator, that this ſhould be the Conſtruction. For, though the Deviſe be "for Life *only*," yet if the Intention of the Teſtator ſhould appear, upon the Whole Will taken together, to be manifeſtly *otherwiſe*; It ſhall, in *ſuch* Caſe, be conſtrued an Eſtate Tail: As in the Caſe of ‖ *Robinſon* v. *Robinſon*, *M.* 1756, 30 *G.* 2. *B. R.*

‖ *V. ante, pa.* 38. (*ut ſupra.*)

In the Caſe of ‡ *Liſle* v. *Gray*, (which was upon a *Deed*) the Words "Heirs Male of the Body," were, by the *neceſſary Conſtruction* ariſing from the Context, turned into Words of ‡ Purchaſe.

‡ *V.* Sir *Tho. Jones* 114. 2 *Lev.* 223. *Pollexf.* 582. *Raym.* 278. 302, 315.

In the Caſe of *Allgood* v. *Withers*, * Where One *Iſaac Allgood* had by *Deed* conveyed his Freehold Land to Truſtees and their Heirs, and his Leaſehold to Truſtees and their Executors, Upon Truſt that they ſhould apply the Rents and the Benefit of Redemption, to the Plaintiff *Hannah Withers*

* In Chancery, on 4th *July* 1735.

* *Withers for Life*; and after her Death, to the *Heirs of the* * P. 1108.
Body of the ſaid *Hannah Withers* and of *Iſaac Allgood* (ſince deceaſed) and of *Hannah Glaſs* and *Mary Allgood*, their Heirs Executors and Aſſigns, during the Continuance of the Eſtate in the Premiſſes; The Queſtion was Whether *Hannah Withers* took for Life, or in Tail: And Ld. *Talbot* held "That She took an Eſtate for *Life*; and that the Heirs "took as Purchaſers."

In the Caſe of *Bagſhaw* and *Spencer*, *All* the Caſes upon this Subject were ranſacked and thoroughly conſidered: And Lord *Hardwicke* held "that *Heirs of the Body*, (after an "Eſtate for Life to the Father,) ſhould be conſtrued Words "of *Purchaſe*."

To take off the Authority of Deciſions in *Chancery*, I was contended at the Bar, "That as to this Point, there "was a *Diſtinction* between a TRUST and a LEGAL "*Eſtate*; and that even in *Chancery*, there was a Diſtinc-"tion upon this Point, between what they call a Truſt "*executed*, and a Truſt *executory*."

It is true, Theſe Diſtinctions are to be met with, and have often been mentioned: But there don't ſeem to be much Solidity in Either.

ALL Truſts are *executory*: They are to be executed by a *Conveyance*; And the Parties have a Right to apply to a Court of Equity, for ſuch Conveyance.

In *Bagſhaw* and *Spencer*, the Truſt was *executed*, in the Senſe of the Diſtinction, and as contraſted with a Truſt executory.

There ſeems to be as little Ground, in reſpect of *this* Point, for the *other* Diſtinction between a *Truſt* and a *legal* Eſtate.

A Court of EQUITY is *as much bound by poſitive Rules and general Maxims concerning Property* (though the Reaſon of them may now have ceaſed,) as a Court of LAW is.

Whatever is ſufficient, upon a Deviſe, to make an Exception out of the Rule, holds in the Caſe of a *legal* Eſtate, as well as in the Caſe of a *Truſt*. If the *Intention* of the Teſtator be *contrary* to the Rules of Law, it can no more take Place in a Court of Equity, than in a Court of Law: If the Intention be illegal, it is *equally void* in *both*. A Court of Equity can't ſupport an Intention in the Teſtator, to create a Perpetuity, or to limit a Fee upon a Fee, or to make a Chattel deſcend to Heirs, or Land to Executors. On the other hand, *If* the Intention be *not* contrary to Law, a Court of *Common* Law is as much bound to conſtrue and effectuate

*P. 1109. * effectuate the Will *according to that Intention* of the Teſtator, as a Court of Equity can be. Upon the very Point now in queſtion, the Determinations have been agreeable to this Reaſoning. Therefore where the *Truſt* of a Real Eſtate was deviſed "to *A. for Life*, and after his Death to "the Heirs of his Body," Lord *Hardwicke* decreed a Conveyance to *A. in Tail*, although the Eſtate deviſed to *A.* expreſsly "for Life," left no Room to doubt of the Teſtator's *Intention*: But the Rule of Law ſaid, "The Heir of "the Body ſhould take by Deſcent, and not by Pur-"chaſe;" and he thought, the Rule bound a *Truſt*, as well as a legal Eſtate. †

† *Garth* againſt *Baldwin*, in Chancery, 18th *July* 1755.

Where there are Circumſtances which take a Caſe *out of* the Rule, the Exception holds upon a *legal* Eſtate, *as much* as upon a *Truſt*.

The Caſe of *Liſle* v. *Gray* was a *legal* Eſtate, upon a Deed: And the Judgment was *affirmed*, (though by Miſtake, it is ſaid in Sir *Thomas Jones*, to have been *reverſed*.)

Sir *Joſeph Jekyll*'s Decree in *Papillon* and *Voyce* was upon a *legal* Eſtate. And Lord *King*, after conſidering, did not differ from Him; but reverſed the Decree, expreſsly upon a *new* Point, the Diſcovery of Articles in 1697.

Some of the other Caſes I have mentioned, were likewiſe upon *legal* Eſtates.

It is true, Ld. *Hardwike*, in *Bagſhaw* and *Spencer*, laid Hold of this Diſtinction, to avoid expreſsly over-ruling the Certificate in * *Coulſon and Coulſon*. But he certainly *did not agree* in Opinion with that Certificate. In ſpeaking of it, when he delivered his Judgment in *Bagſhaw* and *Spencer*, He expreſſed Himſelf thus—"IF *that Caſe be Law:*" And One of the laſt Things he did in the Court of Chancery was, to ſend a like Caſe to this Court for their Opinion; And He told Me, "He did it, to have *Coulſon and Coulſon* "*reconſidered*." *

* *V. Perrin and another* v. *Blake*, Widow, P. 1769. B. R.

It APPEARS therefore from All that I have been ſaying, That there is NO ſuch *fixed invariable* Rule as has been ſuppoſed, "That Words of Limitation ſhall NEVER "in any Caſe be conſtrued as Words of Purchaſe."

And the preſent Caſe is the ſtrongeſt that I can form any Imagination of, to juſtify a Conſtruction, "that the Heirs "of the Body of *Ann Corniſh ſhall here* take as PUR-"CHASERS." The Deviſe can not take Effect *at all*, but muſt be *abſolutely void*, unleſs the Heirs of her Body take as *Purchaſers*.

It

* IT *muſt be obſerved*, that the Lands deviſed by this Will are GAVEL-KIND. The Teſtator had Nephews and Nieces, and great Nephews and great Nieces: And He provides for them, by 4 diſtinct Clauſes in his Will, according to the 4 diſtinct Stocks. *P. 111C

It is agreed, that where Words of Limitation are grafted upon the Word "*Heir*" in the *ſingular Number, ſuch Heir ſhall take by* PURCHASE. This is *ſettled* ‡ in *Archer's* Caſe, and was *admitted* in the Caſe of *Dubber, on the Demiſe of Trollope*, v. *Trollope, P.* 8 *G.* 2. *B. R.* (though that Caſe was diſtinguiſhed from *Archer's* Caſe, by having † *no* Words of Limitation ſuperadded to the Words "firſt Heir Male.") The DISTINCTION is, That where it appears to be the *Intention* of the Teſtator, that there ſhould be a *Succeſſion in Tail*, it would totally *defeat* that Intention, if all were to veſt in the *firſt* Son: But where it does not appear that the Teſtator intended a Succeſſion in Tail, there indeed the Uſing the Word "*Heir*" in the *ſingular* Number may be a Circumſtance of great Weight. ‡ 1 *Co.* 66. † *V. Robinſon on Gavelkind, p.* 96. and *Abridgment of Caſes in Equity, Vol.* 2. *pa.* 317. *pl.* 31.

Now the Term "*Heirs*," (in the *plural,*) in the Caſe of GAVEL-KIND Lands, *anſwers* to the Term "*Heir*" (in the *ſingular*) in the common Caſe of Lands which are *not* Gavel-kind: For the word "Heir" (in the *ſingular*) would *not ſerve* for *Gavel-kind* Lands; It *muſt* be "Heirs" (in the *plural*.

Therefore All the Arguments and Reaſonings that are applicable to the Word "*Heir*" (in the ſingular,) in the *common* Caſe of Lands *not* being Gavel-kind, hold with equal Strength and Propriety, when applied to the *plural* Termination "*Heirs*" when the Lands *are Gavel-kind*.

And it is manifeſt that the Teſtator does not here mean, that this One Fourth ſhould go in a *Courſe of Deſcent* in Gavel-kind: For He gives it to the Heirs of her Body, *as well Females*, as Males; and mentions *Females*, not only expreſsly and particularly, but even prior to Males. Therefore they can *not take otherwiſe* than as PURCHASERS. It would be a *void* Deviſe, if the Words were to be conſtrued as Words of *Limitation*: For He breaks the Gavel-kind Deſcent, by giving it to *Females* as well as Males. It can not *deſcend* to *Females* as well as Males, by the Rules of Gavel-kind: And yet He ſeems to lay the chief Streſs upon the Word "*Females*." He adds likewiſe, "and to their "Heirs and Aſſigns for ever, to be *divided equally Share* "*and Share alike*:" Nay, He goes further—"as *Tenants* "*in Common* and not as Joint-tenants." But this could not be, if they were to take in the Courſe of *Gavel-kind Deſcent*: For in ſuch Caſe, they muſt take as *Co-parceners*.

The

*P. 1111. * The Teſtator's Diſpoſition of *One* of the Proportions of his Eſtate ſhews his Intent as to the *reſt:* I mean the Deviſe of the One Fourth to the *Widow* of his deceaſed Nephew *Edward Read*, and to the Heirs of her Body &c.; which can receive no other Conſtruction, but that *thoſe* Heirs of the Body muſt *take as* PURCHASERS. For though this Nephew was dead, yet He uſes the very ſame Words in this Deviſe as in the reſt: But he could not mean that his Nephew's *Widow* ſhould take an Eſtate *Tail* in that *whole* One Fourth, or a *joint Fee* with her Children in any *Part* of it. Therefore the *neceſſary* Conſtruction of *that* Deviſe is a ſtrong Argument of his *Intention and Meaning* as to the *reſt*.

As to *Anne Corniſh*'s taking a FEE *jointly with her two Daughters*, in *Thirds*, as Tenants in Common; There can be no Ground for *ſuch* a Conſtruction. For it is clearly the Teſtator's Intention, that the Heirs of *Anne Corniſh*'s Body ſhould not take till *after her Death:* And as the Deviſe to *Her* has no Words of Limitation added to it, It is of Courſe a Deviſe to her *for her Life*; and what She would have taken, if She had ſurvived the Teſtator, would have been an Eſtate for *Life*.

Upon the Whole, as no Man can doubt of this Teſtator's INTENTION; And as this is the ONLY *Method of* EFFECTUATING *it*; And as there is *no Rule of Law* that prevents Heirs taking *as Purchaſers*, where the Intention of the Teſtator *requires* that they ſhould do ſo; I am of Opinion that Judgment ought to be given for the Defendant.

Mr. Juſt. DENISON concurred with his Lordſhip in Opinion, "That Courts of Law (as well as Courts of Equity) "will always conſtrue Wills agreeably to the *Intention* of "the Teſtator, if ſuch Intention be *not contrary* to and *in-* "*conſiſtent* with the Rules of Law:" And He ſhewed that the Intention of the Teſtator, in the preſent Caſe, muſt have been, "that the Heirs of the Body of his Niece *Anne* "*Corniſh* ſhould take as *Purchaſers*;" making the like Obſervations as his Lordſhip had done, upon the Land being *Gravel-kind*, and their being deviſed to the Heirs *Female* as well as Male.

And He held, that it is *not* diſagreeable to or inconſiſtent with the Rules of Law, That "*Heirs of the Body*" ſhould, in *ſome* Caſes, be conſtrued as *Deſignatio Perſonæ:* (a Poſition, not to be diſputed, at *this* Time after ſo many concurring Reſolutions.) And this Caſe now before the Court is *One* of the Caſes where they muſt be ſo conſtrued. Therefore the Heirs of the Body of *A. C.* muſt here take *by* PURCHASE. They can take no other way.

And

* And there is no Foundation for ſuppoſing that *Anne Corniſh*, if She had ſurvived her Uncle, could have taken any Eſtate *jointly with her Daughters*, as Tenants in *Common*. * P. 1112.

(Mr. Juſt. FOSTER was abſent.)

Mr. Juſt. WILMOT premiſed, That the Court were obliged to the Gentleman who had argued this Caſe at the Bar, for declining to go into that long String of Caſes uſually cited upon this Subject. For the Principle that muſt govern all Caſes of this kind, is the INTENTION of the Teſtator, *provided* it be not inconſiſtent with the Rules of Law. And all Caſes which depend upon the Intention of the Teſtator, (which is the Pole-Star for the Direction of Deviſes) are beſt determined upon comparing all the Parts of the Deviſe itſelf, without looking into a Multitude of other Caſes: For Each ſtands pretty much upon its own Circumſtances; And One is no Rule for Another, or very ſeldom at leaſt.

Here, the Teſtator *intended*, beyond all Doubt, That the *Children* of his Nephews and Nieces ſhould take the *Inheritance in Fee Simple*, both Males and Females, *per Capita*, as Tenants in Common. And this is a legal Intention.

But this Intention can not *take Effect* by giving an Eſtate in *Tail* or in *Fee* to the *firſt* Taker: For the Intention of the Teſtator muſt be *ſubſervient to the Law*; and not the Law to the Intention of the Teſtator. Now a Teſtator, be his Intention what it will, can not make an Eſtate deſcend to Males and Females All together; nor Gavel-kind Lands to deſcend to them as Tenants in Common. The Teſtator's Intention can not, therefore, *take Place*, by giving *Anne Corniſh* an Eſtate *Tail*.

Well then! What is to be done? Why (as my Lord *Coke* ſays) You are to *mould* the barbarous Words and Expreſſions of the Teſtator, ſo as to *effectuate* his Intention; *if* you can do ſo, *without* going contrary to the Rules of Law: But you cannot do this, *contrary* to the Rules of Law.

The Queſtion therefore, in the preſent Caſe, comes to this; "Whether it be *abſolutely neceſſary*, that the Words "*Heirs*, or *Heirs Male*, or *Heirs of the Body*, muſt be, in "*all* Caſes, and under *all* Circumſtances, Words of *Limi*-"*tation*."

Now it is certain, that in *ſome* Caſes and under *ſome* Circumſtances, they *may* be conſtrued Words of *Purchaſe*; either upon a *Will*, or upon a *Deed*. The Caſe of * *Liſle* v. *Gray* 1107. * *V. ante* Pa.

*P. 1113. * *Gray* was upon a *Deed*. And there is a Caſe in *Palm.* 359. *Waker* v. *Snowe*, which was likewiſe upon a *Deed*: "*Edward Egerton* conveyed Lands by Fine, to the Uſe of "Himſelf for Life, Remainder to his firſt Son and the Heirs "Male of his Body begotten &c; and ſo to his Six Sons; "Remainder to the right Heir Male of the ſaid *Edward* "*Egerton* to be begotten after the ſaid ſixth Son, and of "his Heirs Male. This was holden to be only a *contingent* "Eſtate, and *not an Eſtate Tail* in *Edward Egerton*; be-"cauſe it was limited to particular Perſons." They *are not* to be conſtrued as Words of *Limitation*, either upon a *Will* or upon a *Deed*, when the *manifeſt Intention* of the Teſtator or of the Parties is declared to be, or clearly appears to be, "that they ſhall *not* be ſo conſtrued."

Now it is plain, in the preſent Caſe, that the Teſtator did *not* mean to uſe the Words "Heirs of the Body," *as* Words of *Limitation:* It is as clear as if He had expreſsly ſaid, "I "do *not* intend theſe Words in that Senſe."

And as to *Anne Corniſh's* taking an *equal* Share in Fee Simple, in *Common* with her Daughter—*That* Conſtruction can never hold: For it is moſt certain, that the Teſtator did not intend the Diviſion into equal Shares to be *made* till *after Anne Corniſh's* DEATH.

This ſame Conſtruction is further confirmed by the Clauſe which deviſes One Fourth to his *Niece in Law Grace Read*, the *Widow* of his deceaſed Nephew, and to the Heirs of *her* Body, in the *ſame* Form of Expreſſion. For it can never be imagined, that it was his Intention to give *Her*, (who was only the Widow of his Nephew,) an *equal* Share of the *Fee Simple and Inheritance*, with his *natural* Relations.

Per Cur. unanimouſly,
JUDGMENT for the DEFENDANT.

Wedneſday 26th November 1760.

Haward *verſ.* Bankes, Eſq.

MR. Serj. *Hewitt*, ſupported by Mr. *Aſpinall*, Mr. *Campbell*, and Mr. *Winn*, moved in *Arreſt of Judgment*, after the Verdict for the Plaintiff.

This was an Action *upon the Caſe*, (or at leaſt, it was *ſo laid*,) for Damage done to the Plaintiff's Colliery, by what the Defendant had done *in his own* Colliery and within his *own Soil:* Which Colliery belonging to the Defendant lay *near* to that of the Plaintiff, and COMMUNICATED *with it*, though not immediately but *mediately*, there being ſome other Collieries lying between them.

The

* The Declaration conſiſted of *three Counts*, all laid as in Treſpaſs *upon the Caſe*. A Verdict paſſed for the Plaintiff: And the Judgment was taken as an ENTIRE *Judgment* on all the *three* Counts. *P. 1114.

The Objection now made by the Defendant's Counſel, in Arreſt of Judgment, was, That two of theſe 3 Counts are *really* and *eſſentially* in TRESPASS, (though they are *laid as in Caſe*;) And that *Treſpaſs* and *Treſpaſs on the Caſe* can NOT *be* JOINED in the *ſame Action*. *Hardreſs* 60, *Preſton* v. *Mercer*. 2 *Ld. Raym.* 1399. *Reynolds* v. *Clarke*. 1 *Ld. Raym.* 272. *Courtney* v. *Collett*. *Carthew* 436. S. C. *Courtney* v. *Connett*. *Regiſter of Writs* (two Places) *De foſſato terra et fimo impleto*; *per quod &c.*

The DISTINCTION between ‡ *Treſpaſs* and *Caſe*, they ſaid, was This: IMMEDIATE Damage to the Plaintiff's Property, is a Ground for *Treſpaſs*; CONSEQUENTIAL Damage to it, is a Ground for *Caſe*. Now two of theſe 3 Counts are *immediate Acts*, ("that the Defendant CAUSED "great Quantities of Water to be conveyed, through di-"vers other Collieries, into the Plaintiff's Colliery; where-"by *&c*;") and they are therefore, properly in Treſpaſs *vi et armis*: But the 3d Count lays the Damage to be *conſequential*; and is therefore rightly laid in *Caſe*. So that it appears upon the Face of the Declaration, "That Treſ-"paſs and Caſe ARE here *joined together*." ‡ *V. ante*, Pa. 1087, 1088.

The Plaintiff's Counſel *agreed* the LAW; but *denied the Fact*: For they inſiſted, "That *All* the *three* Counts were "ſtrictly and properly Treſpaſs upon the CASE, and laid "the Damage to be *conſequential*, and *not* immediate."

THE COURT (without hearing the Plaintiff's Counſel,) over-ruled the Objection.

The Plaintiff deſcribes, in his Declaration, a Fact which, *as it comes out* at the Trial, *may* or *may not*, be a proper ſtrict Treſpaſs: It might, at the Trial, be proved to be *either* Treſpaſs or Caſe; either One or the other of them, *according to the Evidence*. And it appears, that it *was here proved* at the Trial, to be Treſpaſs *upon the Caſe*. IF it had been proved to be Treſpaſs *vi et armis*, the Plaintiff muſt in *that* Event, have been *non-ſuited*. *Before* the Trial, it ſtood *indifferent*, Whether it would come out to be the One, or the Other. However, in the *Nature* of the Thing, it muſt be a *conſequential* Damage; as the Act complained of was done upon the Plaintiff's *own* Soil.

Let the PLAINTIFF be at Liberty to enter up his Judgment.

The End of * *Michaelmas* Term 1760, 1 *G.* 3.

* Mr. *Juſtice* Foſter was at *Both* during this whole Term.

*P. 1115.

* Hilary Term

1 Geo. 3. B. R. 1761.

The COURT was now *full* again. *

* See the Marginal Note at the End of last Page.

Wednesday 28th *January* 1761.

Rex *verſ.* Turlington.

ON *Saturday* laſt, the 24th of *January*, a Motion was made for a *Habeas Corpus* to be directed to *Turlington*, the Keeper of a private *Mad-houſe*, commanding him to bring up the Body of Mrs. *Deborah D' Vebre*, who was confined there by her own Huſband.

The COURT thought it fit to have a previous Inſpection of Her, by proper Perſons, Phyſicians and Relations; and then to proceed, as the Truth ſhould come out upon ſuch Inſpection And a Caſe was hinted at, where an Inſpection was ordered, in the * laſt Term.

* *Rex* v. *P. Wright et al'*, 24th *November* 1760. *V. ante* 1100.

A Rule was accordingly made, "That Doctor *Robert* "*Monroe*, † *Peter Bodkin*, and ‖ *Edmond Kelly* ſhall at all "proper Times and ſeaſonable Hours, reſpectively be ad- "mitted and have free Acceſs to Mrs. *Deborah D' Vebre* the "Wife of *Gabriel D' Vebre*, in the Affidavit mentioned, at "the Mad-houſe kept by *Robert Turlington*, at *Chelſea*, in "order to conſult with adviſe and aſſiſt the ſaid *Deborah* "*D' Vebre*."

† Her neareſt Relation.

‖ Her Attorney.

On *Monday* the 26th, an affidavit of Dr. *Monroe*'s was read; and Dr. *Monroe* alſo perſonally aſſured the Court, "That He had ſeen and converſed with this Woman, and "examined her Nurſe; and ſaw no ſort of Reaſon to "ſuſpect that ſhe was or had been diſordered in her Mind: "On the Contrary, He found Her to be very ſenſible, and "very cool and diſpaſſionate."

Lord MANSFIELD—Take a Writ of *Habeas Corpus*: And if this ſhould appear to be the Caſe, We ought to go further.

Mrs. *D' Vebre* was now brought into Court by Mr. *Turlington*. But no Return was indorſed upon the Writ.

She

* She appeared to be abſolutely free from the leaſt Appearance of inſanity. * P. 1116.

She was prepared to have ſworn Articles of the Peace againſt her Huſband; and they were offered in Court, ready ingroſſed: But not being ſtamped, they could not be read.

She was permitted to go away with her Attorney, to his Houſe; He undertaking to produce Her here to Morrow Morning.

Note—She deſired not to go back to the Mad-houſe: And the Court would not permit her Huſband to take Her, under the preſent Circumſtances of Danger apprehended by her from Him.

It afterwards ended in a Compromiſe, and an Agreement to ſeparate.

Sprightly, on the Demiſe of John Collins, *verſ.* Humphry Dunch.

Thurſday 29th *January* 1761

In Ejectment—

ON Mr. *Clayton's* Motion, ſupported by Mr. *Gould*, who cited 2 Caſes out of *Barnes*; (Vol. 2. *Supplement* 23. * 26 †) And on affidavit "That *Bogguſt*, the Tenant in Poſ- "ſeſſion *abſconded*; and that the Plaintiff had perſonally "*ſerved his Niece*, who was the only *Manager of this Houſe*, "and reſided in it; and had alſo *fixed up another Copy* of "the Declaration upon the Premiſſes;"

* *H.* 26 *G.* 2. *Roe, ex dimiſſ Fernley and Tancred*, v. *Doe*. † *Tr.* 27, 28 *G.* 2. *Fenn, ex dimiſſ. Knight*, v. *Dean*.

Note—Theſe Caſes are not in the 1ſt Edit. 1754.

The COURT, perceiving the Inconvenience that Landlords might ſuffer by being kept out of Poſſeſſion, thought it reaſonable to make a Rule upon the Tenant in Poſſeſſion to ſhew Cauſe "Why Judgment ſhould not be "entered up againſt the caſual Ejector;" and accordingly did make ſuch Rule: And they further Ordered that Notice of the preſent Rule, being given to *any* Perſon in the Houſe, ſhould be ſufficient; And if no Perſon was in the Houſe, then to be *affixed to the Door &c.*

On *Wedneſday* 11*th February* This Rule was made abſolute without Defence; on Affidavit of Notice being given to the *Niece*, and alſo *affixed* to the Door of the Houſe. §

§ *V. poſt* S.P. *accord. Goodright, ex dimiſſ. Methold*, v *No-Right*; 23d *May* 1761; and *Fenn, ex dimiſſ. Tyrrell et al*, v. *Denn*; 26th *May* 1761. *poſt.* 1181.

* Rex *verſ.* John Gardner Eſq.

* P. 1117. *Thurſday 5th February 1761.*

THE AFFIRMATION *of a Quaker, (John Lewis of Lantriſhent in Monmouthſhire)* was offered, in *Exculpation of Mr. Gardner the Defendant*, upon ſhewing Cauſe why an Information ſhould not be exhibited againſt Mr. *Gardner* for a Miſdemeanour.

The Reading of this Affirmation was objected to, by the Proſecutor's Counſel; and not much inſiſted upon, by the Counſel for the Defendant.

The COURT held clearly, That a Quaker's Affirmation could *not* be read, in *Support* of a *Criminal* CHARGE: But they thought that an Affirmation *might* be read in *Defence* of a criminal Charge, if the Perſon charged was *Himſelf* a Quaker, in order to exculpate *Himſelf*.

In this *third* Caſe, of a Quaker's *collateral* Evidence, in Aſſiſtance of the Exculpation of ANOTHER Perſon, when the Quaker himſelf was *not charged* at all, They thought his Affirmation *ought not* to be read: And accordingly, It was withdrawn.

Biddlecombe *verſ.* Kervell.

Friday 6th February 1761.

THIS was an Action of Replevin, upon a Diſtreſs of Hogs taken in the New Foreſt, in *Hampſhire*. The Defendant makes Conuſance, as Bailiff to the King; and juſtifies the taking the Hogs &c, as *Damage feaſant* in the ſaid New Foreſt in the King's Soil.

Plea in Bar—For that, though the Soil is the King's, Yet the King (5 *Ja.* 1.) granted to the Earl of *Southampton* &c. a *Right of Common* for &c, and PANNAGE *for Hogs*, &c, within the ſame Foreſt &c, at ALL *Times of the Year*, as well in the Fence Month, as at other Times &c; Except &c. Then it deduces the Title to &c; in Whom the Right was, at the Time of making the * Statute of 9 & 10 *W.* 3. *c.* 36. Intitled "An Act for the Increaſe and Preſervation "of Timber in the New Foreſt in the County of *South-* "*ampton*:" and ſets forth That Incloſures of 1000 Acres were made, agreeable to the Act; but not of any more than *One* thouſand Acres.

* This Statute (§. 1) gives the King Liberty to incloſe *two* Thouſand Acres; (1000 immediately, and the other 1000 at a ſpecified Time;) † and afterwards, 200 in each Year, for 20 ſucceſſive Years.

† See the Note in the next Page.

It

* It then deduces the Title down to the Duke of *Montague*; and ſhews a Demiſe from him to the Plaintiff, under which, He claims a *Right of Common* and Pannage in *thoſe* Parts of the new Foreſt which are *not* incloſed; and ſhews Enjoyment thereof accordingly: And therefore concludes that the Defendant took them *de injuria ſuâ propria, &c.* * P. 1118.

The Replication of the Avowant admits the *Original Right* of Common and Pannage to have been as ſtated; But relies on the * Clauſe in the Act, "That every Perſon hav- * Sect. 9.
"ing any Right of Common of Paſture or Pannage, or
"any Privileges within the ſaid Foreſt or any part thereof,
"ſhould enjoy the ſame for the future, in MANNER FOL-
"LOWING; *viz.* their ſaid Right of PANNAGE, *between*
"14*th September and* 11*th November yearly*, from and after
"*Michaelmas* 1716, and not before; *on Forfeiture* of any
"Hog Pig or Swine that from and after the Feaſt of *St.*
"*Michael* next, and before the Time aforeſaid ſhall be
"found in the *Waſtes* of the ſaid Foreſt: And their ſaid
"Right of Common of Paſture ſhall be and is hereby con-
"tinued to them in and through ſuch of the ſaid Waſte
"Ground of the ſaid Foreſt, at ſuch Time and Times as
"the ſame ſhall not be incloſed as aforeſaid; the Time of
"the Fence-Month, (*viz.* 15 Days before and 15 Days af-
"ter the Feaſt of *St. John the Baptiſt*, yearly) and the Time
"of the Winter Heyning, (*viz.* from the 11th *November* to
"the 23*d* of *April* yearly) excepted."

Then it ſtates, that the Hogs *&c* were found Damage feaſant, between the 11th of *November* and 23d *April &c*, *within* the Time of the Winter Heyning; and therefore He had a Right to take them Damage feaſant *&c*, and did ſo: Which He avows and juſtifies.

The Rejoinder ſtates that ſuch a Time (ſpecifying the Day) was the firſt Seſſion of Parliment held after the Year † 1699; And that at the End of that Seſſions, the *remaining* One thouſand Acres were NOT admeaſured ſet out or incloſed, *are not yet* admeaſured *&c*; and avers that even at this Time, 100 Acres and no more are incloſed.

† Note. The particular Time ſpecified by the Statute (§ 1) for admeaſuring ſetting out and incloſing the *ſecond* Thouſand Acres, was "from and *immediately* "*after* the Determination of the firſt Seſſions of Parliament which ſhould be held af-"ter the Year of our Lord 1699.

To this Rejoinder, the Avowant demurs.

Mr. *Huſſey* argued for the Avowant; and undertook to maintain, That the Act of 9 & 10 *W.* 3. *c.* 36. *meant* to *reſtrain* the Right of Common and of Pannage; *whether the Incloſure* of the remaining thouſand Acres was ‡ ever made, or not.

‡ Note—In Fact, the Incloſure of 100 Acres was made: And the other thouſand were not incloſed.

The

* P. 1119. † *V.* 9, 10 *W.* 3. *c.* 36. § 9.

* The Queſtion depends chiefly on * the 9th Section of this † Act; which Mr. *Huſſey* diſcuſſed and argued upon, at large.

Mr. *Burland contra*—for the Plaintiff in Replevin.

The 1ſt Queſtion is, Whether the Proviſo ever *intended* to *take away* the Plaintiff's *Right.*

2d Queſtion—Whether (if it did,) the Plaintiff's Right is taken away, by incloſing 1000 *Acres* ONLY.

* *V.* § 11. of that Act of 20 *C.* 2.

Firſt—It only meant to take away *Preſcriptive* Rights of Common: *V.* 20 *C.* 2. *c.* 3 for the Increaſe and Preſervation of Timber within the Foreſt of *Dean*; (from whence this Proviſo is literally * tranſcribed.) And he cited Sir *Francis Barrington*'s Caſe, 8 *Co.* 136.

Secondly—This Right could not be taken away by a *partial* Incloſure.

Mr. *Huſſey*, in Reply—(1ſt) *Hogs* can not be within a *Preſcriptive* Right: The Right for *them* muſt depend upon *Grant.* And this is a *diſtinct independant* Proviſion. (2d. *Some* Part muſt be many Years before it could be incloſed. It was not neceſſary to incloſe the Remainder, at the preciſe Time mentioned in the Act.

Lord MANSFIELD held it clear, that the Statute meant that the Right of COMMON in the *incloſed* Parts ſhould be reſtrained ABSOLUTELY, ſo long as they ſhould *remain incloſed*; but be continued in the UN-*incloſed Parts only*, under certain *Limitations* and Exceptions: But the right of PANNAGE is *abſolutely* taken away, for *Eighteen* Years; and after that, *reſtrained to a particular limited Time*; And theſe Hogs were there found, at a Time when they ought *not* to have been there.

2d. The Incloſure of the *Whole* is not neceſſary: It is *not* a Condition *precedent*, "That the Whole ſhall be firſt in-"cloſed, before the Reſtriction of Common ſhall at all take "Place.

Mr Juſt. DENISON and Mr. Juſt. FOSTER agreed with His Lordſhip in Opinion.

Mr. Juſt. WILMOT—1ſt. This is a Common appendant by Grant. The preſent Queſtion only reſpects *Pannage*: The Action is brought for taking *Hogs* only. The Act gives the Crown the Power of incloſing 6000 Acres in the Whole, for the Sake of increaſing and preſerving the Growth of Timber; And this is to be always free from

*from Common and all Rights &c. whilſt it remains inclоſed: But as to the *uninclоſed*, the Right remains as it was, under certain Limitations and Exceptions. *P. 1120.

But the Right of PANNAGE is quite taken away for Eighteen Years; and is even then reſtrained to a certain limited Time, *viz.* between 14th *September* and 11th *November*.

2dly. And theſe are two diſtinct Clauſes. The Incloſure is not a Condition precedent. Sir *Francis Barrington's* Caſe, does not prove any thing in the preſent Caſe, nor interfere with any thing that I have ſaid.

Per Cur. JUDGMENT for the DEFENDANT.

(Mr. *Huſſey's* Client.)

Hallet Eſq; and Others *verſ.* Eaſt-India Company.

Tueſday 10th February 1761.

UPON ſhewing Cauſe againſt a Rule Why the Defendants ſhould not have Leave to bring 2670*l. into Court*, upon two of the aſſigned Breaches only, * (*viz.* for *Freight* and for *Demorage*) in an Action of *Covenant* brought upon a Charter-Party, by the Owners of a Ship, againſt the *Eaſt-India* Company who had taken it up in their Service; and that the ſaid 2670*l.* ſhould be ſtruck out of the Declaration; (in which Several other Breaches were aſſigned, as well as theſe two;)

* See the very *Words* of this Rule, *infra* 1121. together with an Explanation of its *Meaning*.

Lord MANSFIELD obſerved, that in Motions of this kind, where the Defendant applies to pay Money into Court, and to have the Demand thereupon ſtruck out of the Declaration, the *Law* ariſes upon the FACT; And the true and ſenſible Diſtinction is, "That where the Sum demanded is "a *Sum certain*, or capable of being *aſcertained by mere Com-* "*putation*, without leaving any other Sort of Diſcretion to "be exerciſed by the Jury, It is right and reaſonable to ad- "mit the Defendant to pay the Money into Court, and "have ſo much of the Plaintiff's Demand upon Him ſtruck "out of the Declaration; And that if the Plaintiff will "not accept it, He ſhall proceed at his Peril."

In the preſent Caſe, it being eaſy to *aſcertain by mere Computation* the Demorage at ſo much *per Day*, and the Freight at ſo much *per Tun*, (notwithſtanding that different Sorts of Goods are to pay different Rates *per* Tun;) and to ſettle the Account very exactly, from *Facts that muſt be notoriouſly known* in the Ship; And Nothing elſe remaining to be ſettled, nor any thing further being left for the Judgment and Diſcretion of the Jury to be exerciſed upon; the Defendants

*P. 1121. * dants ought, in the preſent Caſe, to be at liberty to pay the Money into Court, upon theſe two Counts: But then, on the other hand, the Plaintiffs ought to have INSPECTION of the Ship's Papers, now remaining in the Hands of the Company; in Order to enable them to judge Whether it will be prudent and adviſeable for them to *accept* the Money ſo brought in; or to *proceed* in their Cauſe. And this Method will be moſt advantagous to both Sides.

This Propoſal was readily agreed to, on both Sides: And a Rule was made accordingly.

The Original Rule was made on the Motion of Mr. *Norton* and Mr *Winn*, on behalf of the Defendants, and was worded thus.—"That the Plaintiff ſhould ſhew Cauſe Why "the Defendants ſhould not have Leave to bring into Court "the Sum of 2670*l.* with Reſpect to the *Freight* and *De*-"*morage* in this Cauſe; And thereupon, unleſs the Plain-"tiffs ſhall accept thereof, with Coſts to be taxed by Mr. "*Owen*, in full Diſcharge of the ſeveral Breaches aſſigned "in this Suit, on account of Non-Payment of *Freight* and "*Demorage*; the ſaid 2670*l.* ſhall be ſtruck out of the Plain-"tiffs Demands on that Account, and paid out of Court, "to the Plaintiffs or their Attorney; And upon the Trial "of the iſſue, the Plaintiffs ſhall not be permited to give "Evidence for the ſame."

Note——The Meaning of this Rule is——That if the Plaintiffs do not accept the Sum brought into Court, the ſame is to be ſtruck out of the Declaration; and the Plaintiffs, upon the Trial, are not admitted to give Evidence for the Sum brought into Court: And if the Plaintiffs, upon the Trial, do not prove more due to them than the Money brought into Court, there muſt be a Verdict for the Defendants. But the Plaintiffs are at Liberty to accept the Sum brought into Court, in reſpect to the Breaches aſſigned for Non-Payment of Freight and Demorage, and to proceed as to any other Breaches mentioned in the Declaration (excepting thoſe two,) if they think proper.

This RULE was made abſolute: And it was now further added, "That a *true Freight-Note* be delivered "to the Plaintiffs; And that the Plaintiffs ſhall have "*Inſpection* of all Papers, Books *&c.* that may aſcer-"tain the Ship's Freight and Earnings."

Rex

* Rex *verſ.* John Perrott. * P. 1122.

THE Defendant being brought up from *Newgate*, by HABEAS CORPUS, appeared upon the Return to have been committed by *Commiſſioners of* BANKRUPTCY, to be ſafely kept and detained, without Bail or Mainprize, "UNTIL *ſuch Time as He ſhall* SUBMIT *Himſelf to* "*the ſaid Commiſſioners* or the major Part of them, and FULL "*Anſwer* make, to *their Satisfaction*, to the *Queſtion* ſo put "by them to him as aforeſaid." Which Queſtion was ſpecified in their Warrant, to have been put to him by them in Writing, upon the LAST Day of his Examination, after his having obtained 46 Days beyond the ordinary Time; and to have been propounded to him in theſe Words, *viz.* "As you do admit that you have ſpent the laſt Week pre-"vious to this your Examination with Mr. *Maynard* (one "of your Aſſignees) to ſettle and adjuſt your Accounts and "to draw up a true State thereof, to enable you to cloſe "ſuch your Examination; and do likewiſe admit, that "upon ſuch State thereof, it appears that after giving you "Credit for all Sums of money paid by you, and making "you Debtor for all Goods ſold and delivered to you, from "your firſt entering into Trade to the Time of your Bank-"ruptcy, it appears that there is a Deficiency of the Sum "of 13513*l.* Give a true and *particular* Account *what is* "*become* of the ſame; And *how and in what Manner* you "have *applied and diſpoſed* thereof." To which Queſtion ſo put by the Commiſſioners as aforeſaid, The ſaid *John Perrott* did wilfully and obſtinately refuſe to give any other than the following GENERAL *Anſwer*, (that is to ſay) "That on Goods ſold this laſt Year, I have loſt upwards of "2000*l.* And by the Mournings, I have loſt upwards of "1000*l.* And that for 9 or 10 Years, I have (and I am ſor-"ry to ſay it) been EXTREAMLY EXTRAVAGANT, and "*ſpent* LARGE *Sums* of Money. *John Perrott.*" Which Anſwer of the ſaid *John Perrott* NOT *being* SATISFACTORY to Us the ſaid Commiſſioners——Theſe are therefore to will require and authorize you immediately upon Receipt hereof to arreſt *&c*, and him ſafely to convey, *&c*, and to deliver *&c*, ſafely to keep and detain, without Bail or Mainprize, UNTIL ſuch Time as he ſhall *ſubmit* himſelf to Us the ſaid Commiſſioners or to the major Part of the ſaid Commiſſioners by the ſaid Commiſſion named and authorized, and FULL *Anſwer make* to our or their *Satisfaction*, *to the Queſtion ſo put to him* by Us as aforeſaid.

Two Reaſons were urged on the Part of the Defendant, why he ought to be diſcharged from this Impriſonment. 1ſt, That the Anſwer which He had already given was a *full ſufficient* and *ſatisfactory* Anſwer and the *beſt and only One* that could be given by an idle extravagant Man who had never

*P. 1123. *never kept any Accounts: And, conſequently, that the Impriſoning him *until* he ſhall give a *more* full and ſatisfactory Anſwer to the Queſtion, was an *Impriſonment for Life.*

The 2d Reaſon was, That the *Power and Juriſdiction* of the Commiſſioners, *to take* the Bankrupt's Examination and Diſcloſure, was *temporary* and *limited*, and *confined* to the Time allowed to the Bankrupt to come in and ſurrender himſelf and ſubmit to be examined; *After* which limited Time, the Commiſſioners had *no Power to examine him at all:* Conſequently, they had no Juriſdiction to commit him for any LONGER *Time* than their own Power to examine him laſted; which did not exceed the Time allowed him to come in and ſurrender himſelf and ſubmit to be examined. And his Counſel compared it to a Commitment by the Houſe of Commons; which ended with their Seſſion.

In ſupport of theſe Objections, they relied upon the Conſtruction of the Bankrupt-Acts; and particularly of 5 *G.* 2. *c.* 30. § 1, 2, 3.

On the other Side, it was inſiſted—1ſt. That the Bankrupt's Anſwer was *nugatory* and *inſufficient*; and 2dly. That the Power and Juriſdiction of the Commiſſioners to examine the Bankrupt, and obtain a Diſcloſure and Diſcovery of his Eſtate and Effects and the Manner in which He had diſpoſed of them, was *not limited and confined* to the laſt Minute allowed him for his Surrender and Submiſſion; but might be purſued and proceeded upon at *any* SUBSEQUENT *Time.* And for this, they relied upon the End and Intention and genuine Conſtruction of all the Bankrupt-Acts, and particularly of 1 *J.* 1. *c.* 15. § 7, 8. and 5 *G.* 2. *c.* 30. § 16.

Lord MANSFIELD——If the Queſtion put was improper; or if the Queſtion be proper, and the Anſwer ſatisfactory, the Man ought to be diſcharged. But this is a *proper* Queſtion; And the Anſwer is very *inſufficient and unſatisfactory.*

The conſtruction offered by the Counſel who object to this Commitment, is founded upon mere arbitrary Implication: The Legiſlature ſay no ſuch Thing. On the Contrary, The 5 *G* 2. *c.* 30. § 16. gives Power to the Commiſſioners to commit the Bankrupt UNTIL he ſhall ſubmit himſelf, and *full Anſwer make to their Satisfaction:* And Section 17th gives Power to the Court or Judge, to recommit him to the ſame Priſon, there to remain as aforeſaid, UNTIL He ſhall conform as aforeſaid.

The *Examination* is *not confined* to be *within* the Time limited for the Bankrupt to come in and ſurrender and ſubmit to

be

* be examined. The Bankrupt muſt indeed *ſurrender* within the limited Time; and he muſt *ſubmit* within the limited Time, to be examined from Time to Time; And he muſt, upon his Examination, diſcloſe and diſcover and deliver up his Eſtate and Effects: But the Act does not require the Examination to be full and perfect and * completed within the limited Time; Nor is it proper that it ſhould be ſo. A Man's Memory may fail him at one Time, and be refreſhed at another; Or his Firſt Anſwer may be equivocal, or imperfect: And Why ſhould he not be called upon to explain and complete it? The Power of the Commiſſioners is *general*, and not limited to the Compaſs of Time given to the Bankrupt to come in. * P. 1124. * *V.* 5 *G.* 2. *c.* 30. § 1.

The laſt Examination within the limited Time is material indeed to the *Bankrupt himſelf*, (Becaute he can not afterwards contradict himſelf:) But he may be compelled by the Commiſſioners to make *further* Anſwer, *after* that Time. The Bankrupt may omit to come in, till the very laſt Minute of his Time; And if He then ſurrenders and ſubmits to be examined, this will *ſave his Felony*; But it may be abſolutely *impoſſible* for him to make a full Diſcovery and Diſcloſure of his Eſtate and Effects, or to give full Anſwers to proper Queſtions within *this Space* of Time.

But here, the Commiſſioners have, *within* the limited Time, *required* a further Anſwer to their Queſtion, and committed him for refuſing to give it. This Commitment was *legal*, at the Time when it was made: And I am clearly ſatisfied, that he can not redeem himſelf from his impriſonment, but on giving a *full* Anſwer to the Queſtion. If he ſhould give a full Anſwer, and the Commiſſioners not be ſatisfied with it, He will then be intitled to his proper Remedy.

The Objection has been ſtrongly argued: But there is no Caſe to ſupport it. It is a new invention, and would entirely defend the End and Intention of the Bankrupt-Acts.

The Three JUDGES were All equally clear That the Man ought to be remanded.

Mr. Juſt. FOSTER added, that the Powers under the Statute of 1 *Ja.* 1. *c.* 15. continue ſtill in Force, notwithſtanding the ſubſequent Statutes; And that None of them preclude a further Examination.

Mr. Juſt. WILMOT alſo concurred in this; and ſaid, that All the Bankrupt-Acts ought to be taken *together*, ſo as to anſwer the great general End and Intention of the Legiſlature: The Clauſes operate together, and are auxiliary to each other;

P. 1125. other; And they certainly give a Power of further Examination. There are vaſt Numbers of Queſtions that may be aſked under the Examination, more than can be under the mere Surrender and Submiſſion; that may require further Time, or even ariſe afterwards. The Submiſſion *alone* is not enough: He muſt ſubmit to be *examined from Time to Time*; And he ought not to be diſcharged till he has fully anſwered. His preſent Anſwer is moſt clearly deficient.

Per. Cur. unanimouſly,
The DEFENDANT WAS REMANDED.

V. poſt. pa. 1215. *Monday* 8th *June* 1761.

Thurſday 12th *February* 1761.

Rex *verſ.* Wheatly.

MR. *Norton*, for the Proſecutor, ſhewed Cauſe why Judgment ſhould not be arreſted; A Rule for that Purpoſe having been obtained, upon a Motion made by Mr. *Morton* on *Monday* 26th *January* laſt, in Arreſt of Judgment upon this Indictment for knowingly ſelling Amber-Beer ſhort of the due and juſt Meaſure, (whereof the Defendant had been convicted.)

The Charge in the Indictment was, "That *Thomas* "*Wheatly* late of the Pariſh of *St. Luke* in the County of "*Middleſex* Brewer, being a Perſon of evil Name Fame and "of diſhoneſt Converſation, and *deviſing and intending to* "*deceive and defraud One Richard Webb of his Monies*, on "*&c*, at *&c*, *falſely fraudulently and deceitfully* did *ſell and* "*deliver* and cauſe to be ſold and delivered to the ſaid *Rich-* "*ard Webb* 16 Gallons and no more of a certain Malt Li- "quor commonly called Amber, FOR AND AS 18 Gal- "lons of the ſame Liquor; Which ſaid Liquor ſo as afore- "ſaid ſold and delivered did then and there *want Two* "*Gallons of the due and juſt Meaſure of* 18 *Gallons*, FOR "WHICH *the ſame was ſold and delivered* as aforeſaid; "(the ſaid *Thomas Wheatly* then and there *well knowing* the "ſame Liquor ſo by him ſold and delivered to want 2 Gal- "lons of the due and juſt Meaſure as aforeſaid;) And He "the ſaid *Thomas Wheatly* did *receive* of the ſaid *Richard* "*Webb* the Sum of 15 *Shillings &c.* for 18 Gallons *&c*, *pre-* "*tended* to have been ſold and delivered *&c*; although "there was *only* 16 Gallons ſo as aforeſaid delivered: And "he the ſaid *Thomas Wheatly* Him the ſaid *Richard Webb* of "2 Gallons of *&c. fraudulently and unlawfully* did *deceive* "and *defraud*; To the great Damage and Fraud of the "ſaid *Richard Webb*, To the evil Example of others in the "like Caſe offending, and againſt the Peace of our Sove- "reign Lord the King his Crown and Dignity."

Mr.

*Mr. *Morton* and Mr. *Yates*, who were of Counſel for the Defendant, (to arreſt the Judgment,) objected that the Fact charged was Nothing more than a *mere Breach of a* CIVIL CONTRACT; not an indictable Offence. To prove this, they cited *Rex* v. *Combrun*, *P.* 1751, 24 *G.* 2. *B. R.* Which was exactly and punctually the ſame Caſe as the preſent, only *mutatis mutandis*. And *Rex* v. *Driffield*, *Tr.* 1754, 27, 28 *G.* 2. *B. R.* S. P. An Indictment for a Cheat, in ſelling Coals as and for Two Buſhels, whereas it was a peck ſhort of that Meaſure: There the Indictment was quaſhed on Motion. *Rex* v. *Hannah Heath*—An Indictment for ſelling and delivering 17 Gallons 3 Quarts and ½ Pint of *Geneva*, (and the like of Brandy,) as and for a greater Quantity, was quaſhed on Motion. * P. 1126.

In 1 *Silk.* 151. *Nehuff*'s Caſe, *P.* 4 *Ann. B. R.* A *Certiorari* was granted to remove the Indictment from the *Old Bailey*; becauſe it was not a Matter Criminal: It was "borrowing "600*l.* and promiſing to ſend a Pledge of fine Cloth, and "Gold Duſt; and ſending only ſome coarſe Cloath, and no "Gold Duſt."

In *Tremaine*, * Title *Indictments for Cheats*,—All of them either lay a *Conſpiracy*, or ſhew ſomething amounting to a *falſe Token*. * *V. Tremaine's Pleas of the Crown*, pa. 85 to 111.

A *mere Civil Wrong* will not ſupport an Indictment. And here is no *Criminal* Charge: It is not alledged "that he "uſed falſe Meaſures." The Proſecutor ſhould have examined and ſeen that it was the right and juſt Quantity.

Mr. *Norton pro Rege*, offered the following Reaſons why the Judgment ſhould not be arreſted.

The Defendant has been *convicted* of the Fact. He may bring a Writ of Error, if the Indictment is erroneous.

This *is* an *indictable Offence*; 'Tis a *Cheat*, a *public Fraud*, in the Courſe of his *Trade*: He is ſtated to be a *Brewer*. There is a Diſtinction between *private* Frauds, and Frauds in the *Courſe of Trade*. The ſame Fact may be a Ground for a private Action, and for an Indictment too.

None of the cited Caſes were *after Verdict*. It *might* here (for Aught that appears to the Contrary) have been *proved* "That he ſold this leſs Quantity, *by falſe Meaſure*:" And Every Thing ſhall be *preſumed* in favour of a Verdict. And here is a *falſe Pretence*, at the leaſt: And it appeared upon the Trial to be a very foul Caſe.

The

* P. 1127. * The Counſel for the Defendant, in Reply, ſaid that Nothing can be intended or *preſumed*, in a Criminal Caſe, but *ſecundum allegata et probata:* It *might* happen without his own *perſonal* Knowledge. And they denied any Diſtinction between this being done privately, and its being done in the Courſe of Trade.

Lord MANSFIELD——The Queſtion is, Whether the Fact here alledged be an *indictable* Crime or not. The Fact alledged is—

* *V. ante* 1125. (Then His Lordſhip ſtated the Charge, * *verbatim.*)

The Argument that has been urged by the Proſecutor's Counſel, from the preſent Caſe's coming before the Court *after a Verdict*, and the Caſes cited being only of quaſhing upon Motion *before* any Verdict, really turns the *other* Way: Becauſe the Court may uſe a *Diſcretion*, "Whether it be "right to quaſh upon Motion, or put the Defendant to "demur;" But after Verdict, they are *obliged* to arreſt the Judgment if they ſee the Charge to be inſufficient. And in a *Criminal* Charge, there is NO *Latitude of Intendment*, to include any thing *more* than is charged: The Charge muſt be explicit enough to *ſupport itſelf.*

Here the *Fact* is allowed; but the *Conſequence* is denied: The objection is, that the Fact is *not an Offence indictable*, though acknowledged to be true as charged.

And that the Fact here charged ſhould not be conſidered as an indictable Offence, but left to a Civil Remedy by an Action, is reaſonable and right in the nature of the Thing: Becauſe it is only an inconveyance and Injury to a *private* Perſon, ariſing from that private Perſon's own Negligence and *Careleſſneſs* in not meaſuring the Liquor, upon receiving it, to ſee whether it held out the juſt Meaſure or not.

The Offence that is indictable muſt be ſuch a one as affects the PUBLIC. As if a Man *uſes falſe Weights and Meaſures*, and ſells *by them* to all or to many of his Cuſtomers, or uſes them in the *general* Courſe of his Dealing: So, if a Man defraudes Another, under *falſe Tokens.* For theſe are Deceptions that *common* Care and Prudence are not ſufficient to guard againſt. So, if there be a *Conſpiracy* to cheat: For *ordinary* Care and Caution is no Guard againſt this.

Thoſe Caſes are much more than mere private Injuries: They are *public Offences.* But here, it is a mere *private* Impoſition or Deception: No falſe Weights or Meaſures are uſed; No falſe Tokens given; No Conſpiracy; Only an Impo-

* Impoſition upon the Perſon he was dealing with, in delivering him a leſs Quantity inſtead of a greater; which the other careleſsly accepted. 'Tis only a Non-performance of his Contract: For which Non performance, He may bring his Action. * P. 1128.

The Selling an unſound Horſe, as and for a ſound One, is not indictable: The Buyer ſhould be more upon his Guard.

The ſeveral Caſes cited are alone ſufficient to prove, That the Offence here charged is *not* an *indictable* Offence. But beſides theſe, my Brother *Deniſon* informs Me of another Caſe, that has not been mentioned at the Bar. It was *M.* 6 *G.* 1. *B. R.* * *Rex* v. *Wilders*, a Brewer: He was indicted for a Cheat, in ſending in, to Mr. *Hicks*, an Ale-houſe keeper, ſo many Veſſels of Ale *marked* as containing ſuch a Meaſure, and writing a *Letter* to Mr. *Hicks*, aſſuring him that they did contain that Meaſure; when in Fact they did not contain ſuch Meaſure, but ſo much leſs &c. This Indictment was quaſhed on Argument, upon a Motion: Which is a ſtronger Caſe than the preſent,

* I have a like Account of this Caſe. The Court ſaid that the Proſecutor could not have been impoſed upon, without his own Careleſſneſs; and inſtanced the Caſe of ſelling an unſound Horſe, affirming Him to be ſound: And they Held that ſuch private unfair Dealings which did not affect the Public, were not indictable Crimes; unleſs accompanied with falſe Tokens, or Conſpiracy, or Selling by falſe Weights or Meaſures.

Therefore the Law is clearly eſtabliſhed and ſettled; and I think, on *right* Grounds: But on whatever Grounds it might have been originally eſtabliſhed, yet it ought to be adhered to, after it is eſtabliſhed and ſettled.

Therefore, (though I may be ſorry for it in the preſent Caſe, as circumſtanced;) The Judgment muſt be arreſted.

Mr. Juſt. DENISON concurred with His Lordſhip.

This is nothing more than an Action upon the Caſe turned into an Indictment. 'Tis a *private Breach of Contract*. And if this were to be allowed of, it would alter the Courſe of the Law; by making the injured Perſon a *Witneſs* upon the Indictment, which He could not be (for himſelf) in an Action.

Here are no falſe Weights, nor falſe Meaſures; nor any falſe Token at all; nor any Conſpiracy.

In the Caſe of *The Queen* v. *Maccarty et al'* † there were falſe Tokens, or what was conſidered as ſuch. In the Caſe of ‖ *The Queen* v. *Jones*, 1 *Salk.* 379 the Defendant had received 20*l.* pretending to be ſent by One who did not ſend it him—*Et per Cur.* " It is not indictable unleſs " he

† 6 *Mod.* 301. 2 *Ld. Raym.* 1179.
‖ 2 *Ld. Raym.* 1013. and 6 *Mod.* 105. S. C.

* P. 1129. * " he came with falſe Tokens: We are not to indict one " Man for making a Fool of another; Let him bring his " Action."

If there be *falſe Tokens* or a *Conſpiracy*, it is another Caſe. *The Queen* v. *Maccarty* was a * Conſpiracy, as well as falſe Tokens. *Rex.* v. *Wilders* was a much ſtronger Caſe than this; and was well conſidered: That was an Impoſition in the *Courſe of his Trade*; and the Man had *marked* the Veſſels, as containing more Gallons than they did really contain, and had written a *Letter* to Mr. *Hicks*, atteſting that they did ſo.

* *V. ſupra* and 6 *Mod.* 302. particularly.

But the preſent Caſe is no more than a *mere Breach of Contract*: He has not delivered the Quantity which he undertook to deliver.

The Court uſe a *Diſcretion* in quaſhing Indictments on *Motion*: But they are *obliged* to *arreſt Judgment* when the Matter is *not indictable*. And *this* Matter is *not* indictable: Therefore the Judgment ought to be *arreſted*.

Mr. Juſt. FOSTER—We are obliged to follow ſettled and eſtabliſhed Rules already fixed by former Determinations in Caſes of the ſame kind.

The Caſe of *Rex* v. *Wilders* was a ſtrong Caſe; (too ſtrong perhaps; for there were falſe Tokens: the Veſſels were *marked* as containing a greater Quantity than they really did.)

Mr. Juſt. WILMOT concurred. This Matter has been fully ſettled and eſtabliſhed, and upon a reaſonable Foot. The true Diſtinction that ought to be attended to in all Caſes of this kind, and which will ſolve them all, is this—That in ſuch Impoſitions or Deceits where common Prudence may guard Perſons againſt the ſuffering from them, the Offence is not indictable, but the Party is left to his Civil Remedy for the Redreſs of the Injury that has been done him: But where falſe Weights and Meaſures are uſed, or falſe Tokens produced, or ſuch Methods taken to cheat and deceive, as People can not, by any ordinary Care or Prudence be guarded againſt, there it is an Offence indictable.

In the Caſe of *Rex* v. *Pinkney*. *P.* 6 *G.* 2. *B. R.* upon an Indictment " for ſelling a Sack of Corn (at *Rippon* Market) " which he falſely affirmed to contain a *Wincheſter* Buſhel, " *ubi revera et in facto plurimum deficiebat &c,*" The Indictment was quaſhed upon Motion,

In

In the Caſe now before Us, the Proſecutor might have meaſured the Liquor, before he accepted it: And it was his own Indolence and Negligence if He did not. Therefore common Prudence might have guarded him againſt ſuffering any Inconvenience by the Defendant's offering him leſs than he had contracted for. *P. 1130.

This was the Caſe of *Rex* v. *Pinkney:* And it was there ſaid, That if a Shop-keeper who deals in Cloth, pretends to ſell Ten Yards of Cloth, but inſtead of Ten Yards bought of him, delivers only Six, Yet the Buyer cannot indict him for delivering only Six; Becauſe He might have meaſured it, and ſeen whether it held out as it ought to do, or not. In this Caſe of *Rex* v. *Pinkney*, and alſo in that Caſe of *Rex* v. *Combrun*, a Caſe of *Rex* v. *Nicholſon*, at the Sitting before Ld. *Raymond* after *Michaelmas* Term, 4 *G.* 2. was mentioned; Which was an indictment for ſelling Six Chaldron of Coals, which ought to contain 36 Buſhels each, and delivering Six Buſhels ſhort: Lord *Raymond* was ſo clear in it, that He ordered the Defendant to be acquitted.

Per Cur. unanimouſly.

The JUDGMENT muſt be * ARRESTED. * See the next Caſe, S. P. *accord.*

Rex *verſ.* Dunnage.

THIS Caſe was exactly the ſame Point with that of *Rex* v. *Wheatly*, which was determined this very morning. †

† *V. ante*, *pa.* 1125. (the laſt preceding Caſe.)

The Defendant ſtood indicted for knowingly ſelling and delivering Three Buſhels and a half of Oats, as and for Four Buſhels, which wanted half a Buſhel of the juſt and due Meaſure; with Intent to deceive and defraud *&c.*

Upon Mr. *Stowe*'s Motion to quaſh this Indictment, and Mr. *Norton*'s agreeing that it could not be ſupported, ſince the Determination of the Court this morning, in the Caſe of *Rex* v. *Wheatly*,

This INDICTMENT was alſo QUASHED;—the Rule for ſhewing Cauſe why it ſhould not be ſo, being made abſolute without Argument.

V. Rex v. *Oſborn. poſt. pa.* 1697. 10th *June* 1765.

*P. 1131. * The following Case may be considered as One of this Term, because the Certificate bears Date in the Vacation next following it, and nearer to *Hilary* Term than to *Easter* Term.

Selwyn Esq; *verf.* Selwyn Widow and Others.

THIS Case came out of Chancery, for the Opinion of the Court of King's Bench.

It was twice argued here, and both Times very elaborately and well; first by Mr. *Sewell*, for the Plaintiff, and Mr. *Charles Yorke*, Solicitor General for the Defendants, in *Easter* Term 1760, 33 G. 2. and again in *Michaelmas* Term 1760, 1 G. 3. by Mr. *De Grey*, for the Plaintiff, and Mr. *Norton* for the Defendants.

The Causes in Chancery were thus intitled—

Between *George Augustus Selwyn* Esq; now the Eldest Son and Heir of *John Selwyn* Esq; deceased, } Plaintiff;

Mary Selwyn Widow and administratrix with the Will annexed of the said *John Selwyn*, and Others, } Defendants;

And

Between The said *Mary Selwyn* Widow, Plaintiff;

The said *George Augustus Selwyn* and Others, } Defendants;

The Case stated several Family-Settlements and Transactions: By which it appeared that the Premisses were limited in strict Settlement to *John Selwyn* the Elder for Life; Remainder to his first and every other Son by his Wife *Mary*, successively, in Tail Male; Remainder to *John Selwyn* the Elder and his Heirs.

John Selwyn the Younger was the Eldest Son; And, as such, seised of the Remainder in Tail Male.

By Bargain and Sale, dated 20*th April* 1751, inrolled in the Common Pleas, between the said *John Selwyn* the Elder and *John Selwyn* the Younger of the first Part, *John Wakelin* Gent. of the second Part, and *Francis Donce* Gent. of the third Part, It is Witnessed that for barring All Estates-Tail Remainders and Reversions of and in the Messuages Farms

* Farms Lands and Hereditaments after mentioned, and for * P. 1132.
ſettling and limiting the ſame to and for the Uſes Intents and Purpoſes and in Manner after mentioned, the ſaid *John Selwyn* the Elder and *John Selwyn* the Younger did Grant Bargain and Sell unto the ſaid *John Wakelin* and his Heirs, All thoſe two Farms Lands and Hereditaments in the Poſſeſſion of the ſaid *John Harris* and *William Harris* mentioned in the ſaid Bargain and Sale of the 12th of *June* 1750 with the Appurtenances, and the ſaid 4 Farms in the Indentures of Leaſe and Releaſe of the 1ſt and 2d of *April* 1751, then in the ſeveral Tenures of *William Gaſcomb*, *John Print*, *Mary Print*, and *Jane Cannon*, and with their Appurtenances, and the Reverſion and Reverſions *&c:* To hold to and to the Uſe of the ſaid *John Wakelin* and his Heirs, To the Intent He might become Tenant of the Freehold, to the End a Common Recovery might be ſuffered of the Premiſſes comprized in that Indenture of Bargain and Sale. For which Purpoſe, it was agreed that the ſaid *Francis Donce* ſhould, on this Side or before the End of *Eaſter* Term then next, or of ſome ſubſequent Term, proſecute a Writ of Entry upon Diſſeiſin of the ſame Premiſſes, againſt the ſaid *John Wakelin*; who was to appear and vouch over to Warranty the ſaid *John Selwyn* the Younger, who was to vouch the Common Vouchee. And it was thereby declared and agreed, that from and immediately after the ſuffering the ſaid Common Recovery ſo as aforeſaid or in any other Manner or at any other Time ſuffered or to be ſuffered, the ſaid Common Recovery and All and Every other Common Recovery or Recoveries then-to-fore or then-after to be had or ſuffered of the ſaid Premiſſes between the ſaid Parties, ſhould enure, and the Recoverors ſtand ſeiſed of the Premiſſes, to the Uſes aftermentioned, *viz.* To the Uſe of the ſaid *John Selwyn* the Elder for Life, without Impeachment of Waſte, with Power to grant Leaſes for any Term not exceeding 21 Years; Remainder to the Uſe of the ſaid *John Selwyn* the Younger, his Heirs and Aſſigns for ever.

Eaſter Term ended on the 20th of *May* 1751.

On the 30th of *May* 1751, The Writ of Entry was ſued out.

This Writ of Entry was returnable in 15 Days from the *Holy Trinity*; which was the 16th Day of *June* in the ſaid Year 1751. *Trinity* Term began on the 7th of *June* 1751.

On the 8th of *June* 1751, *John Selwyn* the Younger made his Will in the Words or to the effect following, *viz.* " This is the laſt Will and Teſtament of me *John Selwyn* " the Younger; which I now make and publiſh in order to " ſettle my Real Eſtate in ſuch prudent Manner as to conti-

*P. 1133. " * nue the ſame in my own Family. And for that Pur-
" poſe, I do hereby give and deviſe unto my Honoured
" Father *John Selwyn* Eſq; All that my Manor or Lordſhip
" of *Luggerſhall* in the County of *Wilts*, and all my Manor
" of *Matſon* in the County of *Glouceſter*, with the Rights
" Members and Appurtenances thereunto belonging, and
" all other my Manors Meſſuages Farms Lands Tenements
" Rectories Advowſons Rents and Hereditaments whatſo-
" ever, and all the Freehold and other Eſtate of Inheri-
" tance whereof I the ſaid *John Selwyn* the Younger or any
" Perſon or Perſons whatſoever In Truſt for or to my Uſe
" are or is ſeiſed or poſſeſſed either in Poſſeſſion Reverſion
" Remainder or Expectancy, and all my Eſtate Right Ti-
" tle and Intereſt therein; To hold the ſame unto and to
" the Uſe of my ſaid Father his Heirs and Aſſigns for ever."

On the 12th of *June* 1751, the Bargain and Sale of the 20th of *April* 1751, was acknowledged by *John Selwyn* the Elder before Mr. Juſt. *Gundry* in Court, and afterwards inrolled.

The Writ of Entry *ſur Diſſeiſin en le Poſt* was returnable on the 16th *June* in the ſame Year.

The Writ of *Seiſin* was teſted 19th *June*; returnable forthwith.

The Sheriff executed the Writ of Seiſin, on the 22d of *June* 1751: And on the 26th of the ſame *June*, He made his Return on the above Writ.

Trinity Term ended on the 26*th* of *June*.

John Selwyn the Younger died, on the 27*th* of *June* 1751, without altering or republiſhing his Will.

On the Hearing of theſe Cauſes before the Right Honourable the Lord Keeper of the Great Seal of *Great Britain*, on the 11th of *December* 1758, His Lordſhip Ordered that a Caſe ſhould be made for the Opinion of the Judges of the Court of King's Bench upon the following

Queſtion—Whether the ſeveral Lands Tenements and Hereditaments compriſed in the *Deed of the* 20*th of April* 1751, PASSED *by the Will of John Selwyn the Son.*

The Queſtion turned upon two Points;

1ſt. Whether *John Selwyn* the Younger, at the Date of his Will, had any Uſe Eſtate or Intereſt in the Premiſſes, to deviſe:

2d If He had, Whether the ſubſequent Recovery was a Revocation.

The

* The Certificate returned to the Court of Chancery was dated on 2d *March*, 1761; and was in the following Words, *viz.* * P. 1134.

"Having heard Counſel, and conſidered this Caſe, "(which the Parties, by Agreement between themſelves, "delayed arguing,) We are of Opinion, That the ſeveral "Lands, Tenements, and Hereditaments compriſed in the "Deed of the 20th of *April*, 1751, PASSED by the Will "of *John Selwyn* the Son."

"MANSFIELD.
"T. DENISON.
"M. FOSTER.
"E. WILMOT.

Agreeable to ancient uſage, Upon Caſes referred out of Chancery, The Court did *not* give the *Reaſons* of their Opinion, nor mention the *Ground* upon which they formed it. Therefore I have omitted the Arguments at the Bar, (which were very elaborate, very learned, and very ingenious;) Becauſe they took in many Topics which the *Court* might not form their Judgment upon.

In the Courſe of the Arguments, The Court repeatedly expreſſed their Approbation of the Caſe of Sir *John Ferrers and Sir John Curſon* againſt *Sir Richard Fermor and Others*. * And therefore it is likely that they conſidered the Whole as *One Conveyance*, which muſt relate to the Date of the Bargain and Sale; Which was perfected, made abſolute, and delivered from Objections, by the ſubſequent Ceremonies. * *Cro. Jac.* 643.

It is probable too, from ſome Expreſſions dropped, They might think that *John Selwyn* the Younger, by Virtue of the Bargain and Sale, had a voidable contingent executory Uſe, to ariſe out of the ſubſequent Common Recovery;—That ſuch a Uſe was deviſable;—And that the ſubſequent Recovery executed ſuch Uſe, and made it abſolute.

Note—It had been at firſt urged, on behalf of the Defendants, againſt the Plaintiff the Heir at Law, "That the "Will was made *ſubſequent* to the Recovery: For that the "Will was made on the 8th of *June* 1751, And the Term "begun on the 7th; And the Recovery ſhall *relate* to the "*firſt* Day of the Term, as the Whole Recovery is, both "in Law and in Fact, the Tranſaction of *One* Day: and "therefore the Judgment in the Recovery ſhall be conſi-"dered as *prior* to the Return of the Writ of Entry, and to "the making of the Will; And that there is nothing ap-"pearing upon the Record, to prevent the Court from "conſidering it in this Light." But Mr. *Norton* gave up this

*P. 1135 * this Point, (and the Court had hinted at the Difficulty of ſupporting it,) as this was a Caſe that came out of Chancery upon Facts particularly ſtated; And it is ‡ here ſtated expreſsly "that this Writ of Entry was returnable "in 15 Days from the *Holy Trinity, which was the* "SIXTEENTH Day of *June:*" So that if this muſt be taken as the Fact, "that the Writ of Entry was returnable "on the *ſecond* Return of the Term," and there can be no Judgment till after Appearance, Then the Relation to the firſt Day of the Term is out of the Caſe, And the Recovery cannot be till the ſecond Return of that Term.

‡ *V. ante pa.* 1132.

The End of *Hilary* Term 1761, 1 *G.* 3.

Eaſter

* Eaſter Term, *P. 1136.

1 Geo. 3. B. R. 1761.

Zouch, ex dimiſſ. Woolſton *verſ.* Woolſton et al'. *Wedneſday 15th April 1761.*

THIS was a Caſe upon a Special Verdict in Ejectment. The Queſtion aroſe upon a Deviſe by the Will of *Chriſtopher Woolſton*, who died ſeiſed in Fee of Lands in *Staverton*, *Broadhempſton* and *Weſtogell*, in *Devonſhire*. All the Defendants except *Elizabeth Woolſton* were found Not guilty, generally: And She alſo was found Not guilty, *as to* the Lands in *Staverton*; But, as to the *Reſidue* of the Treſpaſs, relating to the Lands in *Broadhempſton* and *Weſtogell*, the Jury found ſpecially.

The ſpecial Finding was as follows—

Chriſtopher Woolſton being ſeiſed in Fee on the 11th of *Auguſt* 1707, of the Lands &c. in the Declaration deſcribed, in the Pariſhes of *Staverton*, *Broadhempſton*, and *Weſtogell* in the County of *Devon*, and of other Lands in *Tor-Newton* and *Tor-Bryan*, did, by Will of that Date, deviſe to his Wife *Mary*, *Benjamin Abraham*, and *John Pope*, and their Heirs, All his Meſſuages &c. in thoſe Pariſhes, to the following Uſes. As to the Lands in *Tor-Bryan*, to the Uſe of the ſaid Truſtees, for 40 Years after his Deceaſe: And as to the Meſſuages, &c. in *Staverton*, *Broadhempſton* and *Weſtogell*, To the Uſe of his eldeſt Son *James* for Life; Remainder to Truſtees, to preſerve contingent Remainders; Remainder to the firſt and every other Son of *James*, in Tail Male; And in Default of ſuch Iſſue, the like Limitations to his (the Teſtator's) Son *John* &c. Remainder to the Daughters of *James*, in Tail; with like Remainders to the Daughters of *John*, and the like to the Teſtator's own Daughters; Remaider, as to *Weſtogell*, To the Uſe of his own right Heirs; And as to *Staverton* and *Broadhempſton*, To his Couſin——*Woolſton* in Tail, with Remainder to his own right Heirs. And as to the Lands, Meſſuages, &c. in *Tor-Newton* and *Tor-Bryan*, ſubject to the Term of 40 Years,

*P. 1137. * Years, He limited them, first to his Son *John*, and then to his Son *James*, first for Life, and then with Limitations over, (like to the preceding Ones;) with Remainder to his own right Heirs: And the Trust of the Term was declared to be, to raise 1000*l.* out of the Rents and Profits of the Premisses in *Tor-Bryan*, for his Daughter *Elizabeth*; payable, One Moiety at her Marriage, and the Residue within 3 Months after; and in the mean Time 30*l.* a Year for Maintenance; and then the Term to cease.

Then comes this PROVISO, *viz.*

"*Provided* always, and it is my Will Intent and Meaning, That the said *James Woolston* and *John Woolston*, severally and respectively, when they or either of them shall have an Estate in Possession, to his or their respective proper Use or Uses, of and in the aforesaid Messuages Lands Tenements and Hereditaments, for his or their Life or Lives, by virtue of the several Limitations herein before mentioned, shall have full Power Liberty and Authority, *from Time to Time* during his or their respective Life or Lives, by Deed *or Deeds* Writing *or Writings* to be by him or them respectively subscribed and sealed in the Presence of two or more credible Witnesses, *to assign limit or appoint*, to or to the Use of or in Trust for any *Woman or Women that shall be his or their respective Wife or Wives*, for and during the natural Life and Lives of such Woman or Women, for or in the Name or in lieu of their Jointure or Jointures, *All or any Part* of the several Messuages Lands Tenements and Hereditaments to Him or Them the said *James Woolston* and *John Woolston* herein before respectively limited as aforesaid."

The Testator died on the 12th of *August* 1707.

James entered into *his* Part, under the Devise; And *John* also, into *his* Part.

John died seised, leaving only One Son, named also *John*; who is the Lessor of the Plaintiff.

James, being so seised, took to wife the Defendant, then *Elizabeth Bogan*; And, previous to the Marriage by Indenture dated 31st *May* 1712, duly executed, between the said *James Woolston* of the first Part, *William Bogan* of *Gatcomb* in the said County Esq; and *John Legassic* Clerk of the second Part, and the said *Elizabeth Bogan* (Sister to the said *William Bogan*) of the third Part, (*Reciting the said Will* as to the devise to *James*, *and the Proviso*), In Consideration of the intended Marriage, and in Part-performance of certain Articles of Agreement (of the Day before) between the said

* ſaid Parties, *James Woolſton* having by virtue of his Father's Will an Eſtate in Poſſeſſion to his own proper Uſe for his Life in the ſeveral Meſſuages &c ſo deviſed, Doth ACCORDING TO THE POWER TO HIM GIVEN, AND BY VIRTUE THEREOF *and of all and every other* Power and Powers and Authorities which to him doth or may belong, *aſſign limit* and *appoint* to the ſaid *William Bogan* and *John Legaſſic* and the Survivor of them and his Heirs, All that Capital Meſſuage &c and all other Meſſuages Lands &c in *Staverton*, and his Meſſuages and all other his Lands in *Weſtogell*, and the Reverſion and Reverſions &c: To hold, as to the Lands in *Staverton*, to the Truſtees. to the Uſe of *Elizabeth Bogan for Life, for and in the Name and in lieu of her Jointure*, (to commence from and after the Marriage and the Death of *James*;) And as to the other Premiſſes in *Weſtogell*, to the Uſe of the ſaid *Elizabeth Bogan during* the JOINT LIVES of *herſelf* and of *Prudence Woolſton* Widow of the Teſtator's elder Brother, *for and in the Name and in lieu of her Jointure*, (to commence from and after the Marriage and the Death of *James*.) *P.1138.

In this Indenture is contained a *Proviſo*, That if the ſaid *Elizabeth Bogan* do not, within 3 Months after Requeſt made at the Coſts of ſuch Perſon as ſhall then be Tenant of the Freehold, or be ſeiſed of all or any Part of the Meſſuages Lands &c whereof the ſaid *James Woolſton* ſhall during the Coverture be ſeiſed of any Eſtate of Inheritance, RELEASE *all and every Dower and Claim of Dower, and all her Right and Intereſt unto the ſeveral Meſſuages Lands &c* (her ſaid Jointure excepted,) Every Thing contained in this Indenture ſhould be *void*.

There was alſo in this Indenture, a *Covenant* from *James Woolſton* with the Truſtees, That He has *full Power thus to appoint* the Premiſſes in *Staverton* and *Weſtogell*; And that the ſaid *Elizabeth* and his Son by her *ſhall enjoy* according to the Intent of this Deed *and of the Will*, free from all Incumbrances except an Annuity of 50*l. per Annum* payable (out of *Blacker*) to the ſaid *Prudence*: And He covenants to make further Aſſurance, within ten Years, if required.

AFTERWARDS, *during the Coverture*, *James*, by Deed Poll dated the 15th of *February* 1738, (containing a Recital of the abovementioned Deviſe to him, and of the ſaid Indenture tripartite of 31ſt *May* 1712, and of the Proviſo therein contained and abovementioned, and that the then intended Marriage took Effect,) for and in conſideration of the great *Love and Affection* which He bore to the ſaid *Elizabeth* now his Wife, and *for a* BETTER *Proviſion and Maintenance for Her*, RELEASES to *Norton Nelſon* and *Margaret* his Wife Executrix of *William Bogan* the ſurviving Truſtee in the Indenture of 31ſt *May* 1712, the PROVISOES contained

*P. 1139. *contained in the ſaid Indenture and in the Articles of Agreement therein mentioned.

AFTERWARDS, by Indenture dated 3d *October* 1751, Reciting to the ſame Effect as is recited in the Deed Poll of 15th *February* 1738, and alſo reciting that the ſaid *Prudence Woolſton* (the Widow) was dead and that *James Woolſton* had received the Sum of 600 *l.* and upwards which had fallen to his Wife *Elizabeth* ſince their Marriage, ſo that the Jointure made for her by the ſaid Indenture tripartite of 31ſt *May* 1712, was no Way equivalent to the Fortune He had received with Her, He the ſaid *James Woolſton* in conſideration of the Premiſſes and of Love and Affection to the ſaid *Elizabeth* his Wife, as an INCREASE to her Jointure, (being then in Poſſeſſion &c *ut ſupra.*) *aſſigns limits* and *appoints in Purſuance and by Virtue of the* POWER GIVEN HIM BY THE WILL and of all other Powers and Authorities that were in Him, All the Meſſuages Lands &c deviſed to him by his Father's Will, in the ſeveral Pariſhes of *Weſtogell*, *Broadhempſton* and *Staverton* (ſpecifying them particularly) to Truſtees, to the Uſe of the ſaid *Elizabeth* and her Aſſigns for her Life, as an AUGMENTATION *of her Jointure.*

The Jury then find the Value of all the Lands deviſed to *James Woolſton* to be 196*l.* 10*s. per Annum*; *viz.* *Staverton* 90*l.* *Broadhempſton* 60*l.* *Weſtogell* 46*l.* 10*s.* And that the Lands deviſed to *John* were of the yearly Value of 230*l.*

James died on 30th *November* 1756 without Iſſue Male; leaving only One Daughter now living; and Ten Grandchildren by another Daughter, Nine of which are now living.

Elizabeth entered into *all* the Premiſſes deviſed by the Will of *Chriſtopher* and *compriſed in the ſaid Indenture*; and is ſtill poſſeſſed thereof.

John the Son of *John* and Leſſor of the Plaintiff, is, and has been ever ſince the Death of *John* his Father, ſeiſed of the *Reſt.*

Prudence died before *James*, and before his Making the Deed dated *October* 1751.

The Leſſor of the Plaintiff entered into the Premiſſes in *Broadhempſton* and *Weſtogell* on 30 *June* 31 *G.* 2. and demiſed to the Plaintiff &c. But whether upon the whole Matter, the ſaid *Elizabeth* be guilty of the Treſpaſs as to the Premiſſes in *Broadhempſton* and *Weſtogell*, the Jury know not; but pray the Advice of the Court: And if it ſhall ſeem to the Court "that She is guilty thereof," then they find Her guilty; but if &c. then Not guilty.

The

* The Queſtion aroſe upon the PROVISO in the Will of *Chriſtopher Woolſton impowering* his two Sons to make Jointures, and upon the EXECUTION *of that Power*. * P. 1140.

It was argued, on *Friday* laſt, the 10th of *April* 1761, by Mr. *Gould* for the Plaintiff; and now by Mr. *Dunning* for the Defendant.

Mr. *Gould*—The Queſtion (in a narrow Compaſs) is Whether *James Woolſton* had not *completely* EXHAUSTED *his Power*, by executing his Indenture of 31ſt *May* 1712: Or Whether *any Power* REMAINED in him *after* the Making of that Deed.

He began with laying down ſome of the *General Rules as to the execution of Powers; And then propoſed to conſider, 1ſt. The *Senſe* and ſubſtance of the *preſent Power*; 2dly. Whether it was *exhauſted*. * 1 *Salk.* 240. *Lucas* 31. 1 *Peere Wms.* 149. 8 *Rep.* 69. *b.* 2 *Strange* 992.

Firſt—The *Intent* was to enable *James* to make a Jointure on his future Wife or Wives, as often as He ſhould marry.

Secondly—It has been *completely exhauſted* with reſpect to *this* Wife, by the *firſt Deed*; which has *no expreſs Reſervation*, nor *intended* any. It is like the Caſe of Powers of Revocation; which can be executed but once, and not *toties quoties*. This was ſettled in the Caſe of *Hele* v. *Bond*, *Prec. in Chancery* 474.

The Lands in *Staverton* were charged with an Annuity of 50*l. per Annum* to *Prudence*: And the Intention was, "That *Staverton* when clear of that annuity, ſhould be her "Jointure;" And She and her Iſſue were to enjoy thoſe Lands in *Staverton*.

He ſaid He could find no Caſes that were quite applicable to the preſent. *Harvey* v. *Harvey*, † *in Canc.* is not. † 12th *November* 1739. and 22*d July* 1740. See *Equity Caſes Abridged*, *Vol.* 2. *pa.* 669, 670. *pl.* 20, 21, 22.

Mr. *Dunning* now argued for the Defendant—He entered into the Origin, and went through the Hiſtory of *Powers*: Which He divided into three Sorts;

1ſt. *Naked* Powers, unaccompanied with any Intereſt; (Which He allowed, were to be conſtrued ſtrictly;)

2d. Powers given to *Donees in particular Eſtates*: (Which, though to be conſtrued ſtrictly in favour of Remaindermen, yet are extended by Ld. *Harcourt*, in the Caſe of *Beale* v. *Beale*, 1 *Peere Wms.* 244.)

3d. Powers

*P. 1141. * 3d. Powers *reserved by the Donor*, for the Benefit of himself, or of his Heir who would have been intitled to the Fee, if it had not been limited by the Donor's Act. Of this *last* Sort is the present Power: Where the Donor *reserved* a Power to the Tenant for Life, which would otherwise have descended with the Fee; And is *part of the old Dominion* the Donor had over his own Estate.

These have received *liberal* Constructions. *Hob.* 312. *Kibbet* v. *Lee*, *Tr.* 17 *Jac.* 1. *Orby* v. *Mohun*, *Eq. Cases Abr.* 343. *pl.* 5. 2 *Vern.* 531. *Prec. in Chancery* 257. 3 *Chano. Rep.* 102. *Rep. Eq.* 45. *Lady Coventry* v. *Earl of Coventry et al': Eq. Ca. Abr.* 348. *Pl.* 19. *Lucas* 463. 9 *Modern* 12. *Viner's Abr.* Tit. *Powers*, 447. A. 13. *pl.* 4.

The Point is—Whether the *second* Deed of Appointment in this Case is well *warranted* by the Power.

The Objection can only be to the *Manner* of executing it; *viz.* doing it by *Two* Deeds instead of *One*; For it is admitted "It might have been done by *One* Deed."

But the Words of the Power are, "by Deed or *Deeds*:" Which warrants the doing it by *Two*. Powers of leasing, jointuring, selling, revoking &c. may be executed at *different Times*, and by *different Deeds*: As was Lady *Jane Coke's* Case, (then Lady *Jane Holt.*)

As to the Case of *Hele* v. *Bond*, *Prec. in Chancery* 474—That Determination was right: For there the Power of Revocation was executed over the whole Estate.

He denied that there was any Thing in the *first* Appointment, which *takes away* or bars *James's Right* to make a *Second:* Though He admitted that He might *not at that Time* have any formed positive Intention to do so.

The Proviso in the Indenture of 31st *May* 1712, "that "*Elizabeth Bogan* should release all Claim to Dower," was to bar HER, *not him.* And He has released that Proviso.

Besides, She never could have Dower out of *these* Lands. And the *Covenant* "*to enjoy*" is only an *Expressio eorum quæ tacitè insunt*: It does not include nor relate to the *Remainder*-men; but is only a Transaction between the Husband and Wife and her issue; and is only for Enjoyment according to the Intent of the Deed and "*Christopher's* Will."

So

* So that this Covenant would not extinguiſh the Power, or releaſe it, or extend to the remainder-men; but leaves the Matter juſt as it found it: It only operated on the ſubject Matter of that particular Deed. *P. 1142.

Therefore theſe *two* Appointments are not at all incompatible; but are agreeable to the Intent of the Power and of the Parties.

And there was even a *pecuniary* Conſideration for the ſecond jointure; *viz.* her additional Fortune: (though Love and Affection alone were ſufficient.)

As to Authorities—The only One, He ſaid, that ſeems to impeach the Liberality He contended for, is the Caſe of *Rattle* v. *Popham*, 2 *Strange* 992. *M.* 8 *G.* 2. *B. R:* And there indeed, the Court looked upon themſelves to be bound down to a ſtrict Conſtruction, by *Whitlock*'s Caſe, 8 *Rep.* 69. *b.*

But *Harvey* v. *Harvey*, in * *Barnardiſton's Rep. in Chancery*, 103, 109. was *ſince* that Caſe. He then cited it from a *Munuſcript*; and argued from it to the preſent Caſe. He alſo mentioned the Caſe of *Scrope* v. *Offley, in Dom' Proc'* 25*th March* 1736: which he ſaid was unlike to the preſent Caſe and alſo to that of *Harvey* v. *Harvey*; For the latter is in Point, and proves "That ſuch a Power as this is *may* "be executed at ſeveral Times." If the Settlement in 1712, was *not intended* to be a *full* and *complete* Execution of the Power, it ſhall not prevent the making a further Proviſion afterwards. Here the Remainder-Man is a *meer Volunteer*; there, he was a *Purchaſer*.

*Ld. *Manſfield* abſolutelyforbid the citing that Book: For it would be only mileadingStudents, toput them upon reading it. He ſaid it wasmarvellous, however,to thoſe who knew the Serjeant and his Manner of taking Notes, that he ſhould ſo often *ſtumble* upon what was right: But yet, that there was not one Caſe in his Book, which was ſo throughout.

That Caſe was indeed in a Court of *Equity*. But the Conſtructions of *this* Court, and of a Court of *Equity*, ought to be the *ſame:* Elſe, a *defective* Execution of a Power would be in a better Caſe than a *legal* Execution of it.

Mr. *Gould*, in Reply—The Power was *exhauſted* by the firſt Deed, according to the *ſubſtantial* Intent of the Power given by the Will. The Huſband had Power, it is true, to limit *from Time to Time* upon *different* Wives; or upon *One* Wife, at *ſeveral Times* and by *different Deeds*. But upon *this* Deed, it manifeſtly appears *to be*, and to be INTENDED *to be a* COMPLETE *Jointure* by this firſt Deed of 1712: And no ſubſequent Event (as the not having Iſſue Male, for Inſtance,) can make any alteration.

The *contracting Parties*, her *own* Relations and Friends, *intended* that the Lands in *Staverton* ſhould be the *full* and *whole* Proviſion for the Jointure of the Defendant *Elizabeth*

*P. 1143. * *beth:* But as there was an Annuity of 50*l.* a Year iſſuing out of thoſe Lands during the Life of *Prudence*, *therefore* the Farm called *Metley*, lying in *Weſtogell*, was alſo ſettled upon her during the *Joint* Lives of herſelf and *Prudence*, as a Security againſt that Incumbrance upon *Staverton*. And She was obliged by the Proviſo, to releaſe all Right and Title of Dower to *James's Lands of Inheritance*.

The Covenant from *James* is confined, "According to "the Limitations in the *Will:* And the Power given by the "Will was, To make a jointure of *all or any Part* of the "Lands."

I admit that if *James* had *declared* this to be *only in* PART of her Jointure, or *expreſsly reſerved* a Power to add any more, He *might afterwards have augmented it:* But *not* having made any ſuch Declaration or Reſervation, the Power is exhauſted. And it is juſt like the Caſe of *Hele* v. *Bond*, (a Caſe very ſolemnly determined.)

As to the Caſe of *Harvey* v. *Harvey*—There, the Power *never was executed at all.* The Power was to ſettle *Lands:* He ſettled a *Rent-Charge*. It was, at Law, *no* Execution of the Power. It came into Chancery, to ſupply the Defect, and *make* it good, which it was *not* before. And the third Deed there ſhewed the Intention "That it ſhould be *ac-* "*cording to the Power* reſerved to *Edward Harvey* by the "Deed of 1715."

* *In Dom. Proc.* 24th *March* 1735 6.

The * Caſe of *Scrope* v. *Offley* is ſtrong for the Plaintiff here.

Lord MANSFIELD—The material Facts ſtated, are, The Deviſe by *Chriſtopher* to his two Sons, in ſtrict ſettlement; and the Power given them to "ſettle Jointures;" Which Power *James* made Uſe of, upon his Marriage in 1712, by ſettling Lands in *Staverton*, with a proviſional Addition during two joint Lives, of Lands in *Weſtogell*, (there being an Annuity of 50*l.* *per Annum* payable to the Teſtator's elder Brother's Widow out of *Staverton*.) In this Deed of ſettlement, there is a Proviſo for the Wife's releaſing Dower, and alſo a Covenant from *James*, "That he had Power to make "the Appointment," and for Enjoyment under it. He afterwards releaſes her agreement to give up her Claim to Dower. Then comes the Indenture of *October* 1751, in Augmentation of her jointure. There is nothing ſtated in the Verdict, nor any Queſtion made about the *Dower*.

The ſingle Queſtion is Whether the *additional* Jointure is *warranted by the Power*, and is a *good Execution* of it; Or whether the Power was totally *exhauſted* by the ſettlement in 1712. This

* This Queſtion depends upon two Points: 1ſt. What is the *Original Conſtruction* of the Power; 2d. Whether the Settlement of 1712 has *barred James* the Huſband from making any *further* Settlement upon the *ſame* Wife; (provided it be ſuch as is warranted by the Original Conſtruction of the Power.) * P. 1144.

The Firſt Point is—Whether it be neceſſary that this Power muſt be executed *all at once*; Or whether it may be executed at *different* Times.

The Proviſo in *Chriſtopher*'s Will which gives this Power, gives it *at large*, without any Reſtraint: All is left in the Diſcretion of the Huſband. It is no bar of *Dower*; becauſe 'tis only "for or in the Name or in lieu of *Jointure*:" (which does not bar Dower.) The only Limitation to it is, that She can not enjoy it *longer than her Life*.

It looks as if the Drawer of the Clauſe in the Will, which gives this Power, had it in View, "that it *might* be done "at different Times, and repeated more than once." For the words are that the Huſband ſhall have Power "*from* "*Time to Time* during his Life, by Deed or *Deeds* Writing or "*Writings*, to limit *all or any Part* of the Eſtate to any "Woman or Women that ſhall be his Wife or Wives, for "and during their Life or Lives:" And it has no meaning, other than by applying theſe Words to *each reſpective* Wife that he might marry, and conſtruing them to impower the Huſband to make different Settlements upon the *ſame* Wife.

The Anſwer given to this is, "That this Manner of Ex-"preſſion is meant to take in the Caſe of marrying diffe-"rent Wives, *one* after another."

But that might have been done without theſe *particular* Words, and by a more general Manner of Expreſſion than is here uſed.

So that upon the very *Frame* and *Creation* of the Power, it is to be executed at *different* Times, if it ſhall be ſo thought proper.

The Power in the Caſe of *Harvey* v. *Harvey* was in different Words from theſe, and not ſo ſtrong as theſe: The Power there was "to ſettle ſo much of the Premiſſes as "ſhould be of the yearly Value of 60*l*. for *a* Jointure and "Proviſion for ſuch *Wife* during *her* natural Life." That was for A Jointure; *One* ſpecific *entire* Thing: Not "upon "a Wife

* P. 1145. ‡ The Words were, "that if *Edward* marries any other Wife, that then *and ſo often Edward* may ſettle &c.

" a Wife ‡ or Wives;" Not " *from Time to Time;*" Nor " by Deed *or Deeds*, Writing *or Writings.*" It was there urged " That the Power was EXECUTED." The Lord Chancellor (Lord *Hardwicke*) was clear that he might execute the Power at *different* Times; *leſs* than the Whole, *at firſt*; and then more. It was in that Caſe admitted by Mr. *Wilbraham*, " That it might be executed at *different* " Times." And ſo Lord *Hardwicke* again held, at the Re-hearing.

This Caſe now before Us is infinitely ſtronger than that of *Harvey* v. *Harvey*: And it is certain, that in the preſent Caſe, the Power might have been executed at *different* Times, upon the *original Conſtruction* of it.

Second Point—This being ſo, It brings Us to the *Operation* of the Deed of Settlement in 1712; and leads Us to inquire, in the firſt Place, What *James intended* by this Deed, which limits the Lands in *Staverton* and the Farm in *Weſtogell* to the Uſe of the Defendant *Elizabeth*.

It is argued that they are given Her " for and in the " Name and in Lieu of her Jointure; And that there is a " Covenant, " That She and his Sons by Her ſhall en- " joy."

Now if this was a Diſpute with the Son of the Marriage, I ſhould, even in *that* Caſe, think that *James* had *not* exhauſted his Power by this firſt Deed, ſo as to bar himſelf from adding a further Proviſion. For this is *not* ſaid to be *in full* of her Jointure, or *in Bar* of any further Proviſion, or in *full* Satisfaction of it, or any ſuch Thing: And the *Covenant* relates to *Chriſtopher*'s Title and Power of Deviſing; and is for Enjoyment *according to the Will*, and to ſupport the Title to the Eſtate *under the Will*. So that this Covenant does not carry the Thing further than if there had been no ſuch Covenant in the Deed. It is only *Expreſſio eorum quæ tacitè inſunt.*

He might notwithſtanding that Covenant, have executed the Power for the Benefit of *another* Wife, if he had married One. And it is not natural to ſuppoſe that *Elizabeth*'s Friends ſhould tie Him up againſt *Her*, and *not* againſt a *future* Wife, who would be a Step-mother to her Children.

The Caſe of *Scrope* v. *Offley* is not like *this* Caſe. That Caſe turned upon the Words—" To be thereafter made " committed or done by them or either of them:" And there could be no Incumbrance but the ſecond Jointure.

But

* But if there could have been a Doubt, if the Diſpute had been with the Son or other Iſſue of the Marriage; Yet *this* is a Diſpute with the *Remainder-Man*: And it can not be imagined that it could be the Intention of *James* Himſelf or of any of the Parties to this Deed, "That He ſhould "preclude Himſelf from making a further Proviſion for his "Wife, for the Benefit of the *Remainder-Man*, who was no "Party to the Deed, but a mere Stranger to it, and en-"joyed a good Eſtate under the Will." The Remainder-Man could never be in the Contemplation of the Parties who made this Deed. * P. 1146.

And as to this Point—The Caſe of *Harvey* v. *Harvey* is very applicable. That was "*in full* for her Jointure, and "*in full* Recompence and Satisfaction of Dower or Thirds "at Common Law;" And that Power was a Power "to "ſettle *a* Jointure;" And He had by the Deed directed ALL *the Reſidue to be paid over* to the Remainder-Man. But Lord *Hardwicke* obſerved, that though the Huſband barred *Her* to CLAIM, yet He did not bar *Himſelf* to GIVE.

He was, in that Caſe, clear That the former Settlement was no Bar againſt the Huſband's making an *additional* Proviſion for his Wife under the Power: And ſo am I here. There might be many Reaſons very ſufficient to induce Him to make an additional Proviſion for Her. For Inſtance, Alterations might have happened to his Family or Fortune, ſubſequent to the former Settlement. Here is a Circumſtance recited and not contradicted, though not expreſsly found; An *Additional Fortune* came to his Wife ſince the former Settlement was made: So that it became really his *Duty* to make an additional Proviſion for Her; as He had no Iſſue Male. And there is Nothing in the Settlement of 1712, to prevent it.

There is good Senſe in what Mr. *Dunning* ſaid, "That "Executions of Powers ſhould have the *ſame* Conſtruction "Force and Effect in Courts of *Law*, which they have "in Courts of Equity:" Becauſe the Statute of Uſes transferred that Mode of Real Property, from Equity to the Common Law. Whatever is a good Power or Execution in Equity, the Statute makes good at Law.

But in ſome of the early Caſes, they reaſoned in Courts of *Law*, upon theſe Equitable Powers, from Notions applicable to naked Authorities Unconnected with any Intereſt, or to mere legal Powers introduced by other Statutes, (ſuch as Leaſes by Eccleſiaſtical Perſons, or Tenants in Tail;) inſtead of adopting the Liberality of Courts of Equity, and conſidering theſe Powers brought into the Common Law by the ſtatute of Uſes, merely as a MODE *of Ownerſhip or Property.*

* P. 1147. * Conſidering them in *this* Light, No Doubt could ever have been made "Whether a Man might not do *leſs* than "his Power;" Or if he did more, "Whether it ſhould "not be good to the *Extent* of his Power."

Courts of *Equity* reaſoned as they would have done if the Statute had not been made; and were forced to aſſume a Juriſdiction to correct the too ſtrict and narrow Conſtruction put upon Powers and the Execution of them.

And yet whatever is an *Equitable* OUGHT to be deemed a *Legal* Execution of a Power: For there can be no Circumſtances to affect a Remainder Man perſonally in Conſcience, when a *Power* is not duly executed, any more than the Iſſue in Tail or the Succeſſor of an Eccleſiaſtical Perſon if a *Leaſe* is not duly made.

* *M.* 8 *G.* 2. *B. R. Stra.* 992. † 8 *Co.* 70. In the Caſe of * *Rattle* v. *Popham*, THIS Court thought themſelves bound by † *Whitlock*'s Caſe; and held the Leaſe *not* to be warranted by the Power. The Widow brought her Bill in the Court of Chancery: And Lord *Talbot*, arguing from the ſame Premiſſes, the Power and the Leaſe, without any other Circumſtance, held the Leaſe to *be* warranted by the Power. He ſaid, It was *not a defective*, but a blundering Execution: And He decreed the Defendant to pay all the Coſts, both at Law and in Equity.

But there are no Precedents which can ſtand in the Way of our determining *this* Caſe, as it ought to be determined, liberally, equitably and according to the true Intention of the Parties.

Mr. Juſt. DENISON declared Himſelf ſatisfied with theſe Reaſons ſo fully given by Lord *Mansfield*; and that He was of the ſame Opinion.

Mr. Juſt. WILMOT—Courts of *Law* and Courts of *Equity* ought to *concur* in ſupporting the Execution of theſe Powers, which are very convenient to be inſerted in Marriage Settlements, and are very uſeful to Families: And they ought not to liſten to nice Diſtinctions that ſavour of the Sophiſtry of Schools; but to be guided by true good Senſe and manly Reaſon.

After the Statute of *Uſes*, it is much to be lamented that the Courts of Common Law had not adopted all the Rules and Maxims of Courts of Equity, by which they were guided in their Determinations upon them. This would have prevented the Abſurdity of the ſame Party's *receiving* Coſts in *one* Court, and *paying* them in *Another*, upon the very ſame Litigation. Put

*But the *preſent* Caſe wants no Support. Here the two Points are, 1ſt. Whether this Power was, in its *original Creation, intended* to be ſuch as might be executed at different Times, and conſequently might be ſo, if the Tenant for Life thought proper to uſe it in that Manner: 2dly. Whether the *Deed* in 1712 *prevented and barred* the Tenant for Life from repeating it a ſecond Time. P. 1148.

Firſt—The *Intention* is clear, That it was originally intended to be executed at *different* Times, even upon the ſame Woman.

Then it is to be enquired Whether it might be ſo executed, within the *Rules of Law.*

The Determination in the *Caſe of *Hele* v. *Bond* was certainly right. There, the Power of Revocation was executed over the *whole* Eſtate. The Power reſerved to *A.* was "to revoke the Uſes of the Settlement, and declare "new Ones:" And He did revoke the old Uſe, and limit new Ones, without annexing any *new* Power of Revocation to theſe *new* Uſes. There, the firſt Power of Revocation did not ride over the *new* Uſes: It was executed over the *Whole* Eſtate. * *Precedents in Chancery* 474

Here, the Queſtion is, Whether this Power be ſo *indiviſible*, that it can be only executed *once.*

Digges's Caſe is in Point, "That a Perſon who has ſuch "a Power of Revocation may revoke *Part* at *one* Time "and *Part* at another; but not the ſame Part twice, unleſs "he reſerves a *new* Power of Revocation." 1 *Co.* 173 *b.*

And this Power in the preſent Caſe relates *to all and* EVERY PART of the Eſtate, by the expreſs Terms of the Proviſo. It can not therefore be neceſſary to be all done *uno Flatu*; but may be executed at *different* Times: And it is highly reaſonable that it ſhould be ſo. There may be many cogent Reaſons to render it convenient: As Children being more or leſs numerous; A Wife's additional Fortune, or her good Behaviour and Merit; or many other Circumſtances of a Family. And what is ſuch a Power, but a Mode of Conveyance putting the Tenant for Life into the ſame Condition as if he was Tenant in *Fee*, quoad *hoc*? Therefore it may be executed at different Times.

Second Queſtion—Then the only Queſtion is, Whether the *Deed* in 1712 *prevents* this, and *bars James* from making any further Proviſion for his Wife.

*P. 1149. * Now as to the Frame of the Deed, it muſt be obſerved that the PRACTICE in Conveyancing is, *to releaſe* the Power and all further Claim to it, whenever the Power is completely executed, and there is *no Intention to go any further* in the Exerciſe of it.

And as to the Covenant—This Covenant means no more than the uſual Covenant for Enjoyment, *according to the Limitations in the Will*; "that his Wife and her Iſſue ſhall "enjoy it, *ſubject* to the Power given by his Father's Will."

Therefore even *if* there had been Iſſue Male, and this a Litigation with that Male Iſſue of the Marriage, I ſhould ſtill have been of this Opinion that I have now declared: But, as there is *no* Iſſue Male, it would be abſurd to make the Huſband ſtipulate that He ſhould not provide for his Daughter or Daughters and their Children.

And the proviſo "that the Wife ſhould releaſe her Claim "to Dower," does not ſtand in the Way; nor the Releaſe of that Proviſo: For though the Huſband might mean to bind *Her* from CLAIMING any more, Yet he did not mean to bind *Himſelf* from GIVING Her more, if He ſhould think fit. It would be abſurd to ſuppoſe that the Parties to the Deed underſtood or meant it in that Light. Therefore no Inference can be drawn from this Proviſo.

Per Cur, unanimouſly,
JUDGMENT for the DEFENDANT.

Thurſday 16th April 1761. Rex *verſ.* Sir Willoughby Aſton Bart. and John Dodd Eſq; et al'.

MR. *Aſton* and Mr. *Schutz* ſhewed Cauſe againſt a Rule obtained in the laſt Term upon the Motion of Mr. *Norton*, for Sir *Willoughby* and Mr *Dodd*, as Juſtices of the Peace for the County of *Berks*, and Mr *James Head*, Treaſurer of the ſaid County, to ſhew Cauſe why a Writ or Writs of *Mandamus* ſhould not be awarded, directed to them All, Requiring them the ſaid Juſtices to make an Order or Orders upon the ſaid Treaſurer, to *re-imburſe* the Pariſhioners of the Pariſh and Borough of *Newbury* in the ſame County the Sum of 114*l.* 15. expended by the Officers of that Pariſh, *for the Relief of the Wives and Children* of ſeveral MILITIA-MEN ordered out in *actual Service*, in Purſuance of Orders of the ſaid two Juſtices made for that Purpoſe in the Months of *Auguſt September* and *November in* the Year 1759; and requiring him the ſaid Treaſurer to pay the ſame.

Mr.

* Mr. *Aſton* made a Doubt Whether the *Direction* of the Writ was rightly prayed: Or whether it ought not rather to have been prayed to be *directed* to the * *Seſſions*. But however, he ſaid, the Juſtices at Seſſions were very ready to make any Order that the Court ſhould think right aſſoon as they ſhould be informed what the Opinion or Senſe of the Court is; And that they would do this voluntarily, without being compelled by *Mandamus:* But that at preſent, and until they ſhould know the Senſe of the Court, They were of Opinion

* P. 1150

* *V. Peat's* Caſe, 6 *Mod.* 228, 310.

1ſt That a *Subſtitute* of a Militia-man is not properly a *Militia-Man* within the Meaning of 31 *G.* 2. *c.* 26. § 28.

2dly. That, as the Town of *Newbury* does *not contribute* to the County-Stock, but have a *ſeparate Stock* of their own (which was admitted to be true,) they were not intitled to be re-imburſed out of the *County*-Stock, for the weekly Allowance made to the Families of *any Newbury Men* who ſerved as Subſtitutes: But that ſuch Allowance ought to be paid out of the *Newbury* Stock, and not out of the *County*-Stock.

Mr. *Norton*, *contra*, inſiſted, 1ſt. That a *Subſtitute* was properly a *Militia-Man*, within the Meaning of the Act of 31 *G.* 2. *c.* 26 § 28. Eſpecially *ſince the Conſtruction* which the *Legiſlature themſelves* have put upon it, by the ſubſequent Act of 33 *G.* 2. *c.* 22. § 1. 6. and particularly by the Preamble of this latter Statute.

2dly. That the Pariſh of *Newbury* have a great many of their inhabitants who are willing to ſerve as Subſtitutes for Others; And that many *Newbury*-men ſerve as Subſtitutes for other *Newbury*-men; and many of them as Subſtitutes for ſuch Militia-men as are reſident *out* of *Newbury*, and Inhabitants of *other Parts* of the County. And he thought his Requeſt was very fair and equitable: for that He did not deſire to be reimburſed out of the County-Stock, for the Allowances made to the Families of any *Newbury-men* that had ſerved as Subſtitutes for *other Newbury-men*, but of thoſe *Newbury*-men *only*, who had been *ordered out into actual Service*, as Subſtitutes for *ſuch* Militia-men as were *not* Inhabitants of *Newbury*, but of *other* Parts of the *County at large*; purſuant to 31 *G.* 2. *c.* 26. § 28. whereby it is enacted "That when any Militia-man ſhall be ordered out "into actual Service, leaving a Family not of Ability to "ſupport themſelves during his abſence, the Overſeer or "Overſeers of the Pariſh where ſuch Family ſhall reſide "ſhall allow to ſuch Family ſuch weekly Allowance for "their Support, until the Return of ſuch Militia-man, as "ſhall be ordered by any One Juſtice of the Peace; ſuch "Allowance to be *re-imburſed out of the County Stock*, by "the

*P. 1151. " * the Treaſurer of the County: And ſuch Treaſurer " ſhall be allowed the ſame in his Accounts."

Lord MANSFIELD was clear in his Opinion, againſt that of the Juſtices, in both Points.

1ſt. A Subſtitute muſt, *ſince* the Act of 33 *G.* 2. *c.* 22. be conſidered as a Militia-man within the 31 *G.* 2. *c.* 26. For though there might have been a Doubt upon the former Act (at the firſt making of it) " Whether a Subſtitute " was a Militia-man for this Purpoſe;" Yet this Doubt is removed by the latter Act, which is a plain *declaratory* legiſlative Expoſition of the former: The Preamble recites this very Clauſe, and puts this Conſtruction upon it, " That Subſtitutes *are* Militia-men within it."

2dly. As to the Re-imburſement out of the County-Stock, for the Allowances made (under a proper Order) to the Families of ſuch *Newbury*-men as have been Subſtitutes for Inhabitants of the *other* Parts of the County—It is very reaſonable and equitable: And they do not claim it for the Family of any one who was Subſtitute for a Perſon drawn out of the Liſt for their *own Diſtrict*.

Mr. Juſt. DENISON and Mr. Juſt. WILMOT were of the ſame Opinion.

However, as this Queſtion was a very general one, and might affect other Parts of the Kingdom as well as this County of *Berks*, They offered Mr. *Aſton* to conſider further of it, if he had any Doubt about their preſent Opinion.

But Mr. *Aſton* declared he had not: And he anſwered for the Juſtices, that they would conform themſelves to the Opinion of the Court; which they were only deſirous to be appriſed of, in Order to make it the Rule of their Conduct.

Upon which Declaration, THE COURT thought it unneceſſary to make any Rule or Order in Form, upon the preſent Occaſion.

Bevan *verſ.* Protheſk.

IN a long Motion about the Stay of Proceedings in an Inferior Court—

THIS COURT held, that the Delivery of a *Recordari facias loquelam*, to the Clerk of a County-Court, *after Interlocutory*

* *terlocutory Judgment* and *before final* Judgment, is a Stop P. *1152
to all further Proceedings in that Court.

They likewiſe held, That the Officer of the inferior Court can not refuſe paying Obedience to the Writ, under Pretence of his *Fees* not being paid to him: For He is *obliged to obey the Writ*; and has a *proper Remedy*, which He may take, for ſuch Fees as are due to Him.

Stevens *verſ.* Evans et al'.

Tueſday 21ſt *April* 1761.

THIS was an Action of Trover, for Cattle: In which, a Special Caſe was agreed upon, for the Court's Opinion.

The Special Caſe ſtates, That on the 12*th* of *April* 1759, an Aſſeſſment was made and allowed at a Veſtry of the Inhabitants of the Pariſh of *Wix* in *Eſſex*, to *re-imburſe* to *Stephen Durant*, the Overſeer, the monies laid out in the Half Year ended on *Eaſter Monday* then next enſuing the Date, for the neceſſary Relief of the Poor of the ſaid Pariſh of *Wix*, by the ſaid *Stephen Durant* the Overſeer &c. Which Aſſeſſment was in due Manner allowed and confirmed by two Juſtices of the Peace &c, and Publiſhed in the Church &c. That *William Veſey* was therein aſſeſſed 9*l.* 11*s.* That afterwards, *viz.* on 18th *July* 1759, *William Veſey died inteſtate.* That on 12 *December* 1759, ADMINISTRATION of his Goods &c. was granted to *John Stevens*, the *Plaintiff*; who poſſeſſed himſelf of his perſonal Eſtate, and particularly of the Cattle in the Declaration mentioned.

That on the 14th of *January* 1760, two Juſtices of Peace executed a Warrant; in which Warrant, the ſaid Rate or Aſſeſſment is recited; And the Warrant alſo recites That whereas it appeared on the Oath of *Stephen Durant* the late Overſeer, "that the ſaid 9*l.* 11*s.* had been lawfully "*demanded of the ſaid William Veſey deceaſed*, and of his "*Widow and Repreſentative Suſannah Veſey*, ſince his De- "ceaſe, who hath refuſed and doth refuſe to pay the ſame"; It requires the Church-Wardens Overſeers and Conſtables, &c, to make *a Diſtreſs of the* GOODS AND CHATTELS OF THE LATE WILLIAM VESEY; and if within ſix Days next after ſuch Diſtreſs, the ſaid ſum of 9*l.* 11*s.* and alſo reaſonable Charges of the Diſtreſs, rendering the Overplus to Her the ſaid *Suſannah Veſey*, be not paid on Demand, then to ſell &c: And if no Diſtreſs be to be had, then to certify the ſame; ſo that ſuch further Proceeding may be had therein, as to the Law doth appertain.

By Virtue of this Warrant, the Defendant *Goby* (then Conſtable) and the other Defendant *Durant* (the late Overſeer)

* P. 1153 * ſeer at *Wix* aforeſaid on the 19th of *January* 1760, *diſtrained the Cattle, and ſold them* for 15*l*. Which Cattle ſo diſtrained, were the Cattle of the ſaid *William Veſey* in his Life-time and at his Death, and were diſtrained on the Lands in the ſaid Pariſh of *Wix* occupied by the ſaid *William Veſey* in his Life-time.

That the Overplus, after Payment of the Rate, was tendered back.

That Notice of the Action was given to the Juſtices.

The Queſtion upon this Caſe is, Whether the Diſtraining and Taking and Selling the Cattle which were the Goods of *William Veſey*, in *the Hands* of the Plaintiff, his ADMINISTRATOR, by virtue of the ſaid Warrant, was lawful, or not.

This Caſe ſtood now in the Paper, for Argument.

Mr. *Norton*, on Behalf of the Plaintiff, argued that it was *not* lawful; And an Action of Trover is maintainable againſt the Pariſh Officers, for taking them.

1ſt Objection. It is a *bad Rate* and *illegal*.

Firſt—It is a Rate made to *re-imburſe* an Overſeer: Which is a bad Rate, as was ſettled in *Tawney's* Caſe, 2d *Ld. Raym.* 1009. and 6 *Mod.* 97. *Domina Regina* v. *Paroch' de Littleport*, S. C. and 2 *Salk.* 531. S. C. *Tawney's* Caſe. For, the Overſeer was not obliged to advance the Money without a previous Rate: And He may re-imburſe Himſelf out of the next, made in his own Time.

Secondly—It is a Rate made for *Half a Year* ending on *Eaſter Monday* next: Whereas a Rate can not be made for longer than a *Month*. 6 *Mod.* 98. *Tawney's* Caſe *ut ſupra*; but called there *Domina Regina* v. *Par. de Littleport*. The Caſe of *Tracy* v. *Talbot*, * in 2 *Salk.* 532. is in Point.

* The 2d Reſolution.

2d Objection. There was *no Refuſal by the Repreſentative* to pay the Money. Now there can be no Diſtreſs, without a *previous Demand and Refuſal*. The Refuſal was really by *Veſey*, who is dead; and by the Widow who was *not* in Fact (though ſhe is in the Caſe ſtated to be) his *Repreſentative*.

But ſuppoſing the Objections not to hold, and that the Rate and Warrant are *good*; Yet the Goods of *Veſey*, are *not* diſtrainable, in the *Hands of his perſonal Repreſentative*, for a Rate made *upon Veſey* Himſelf.—There is no inſtance of it, nor any Caſe to ſupport

*port this: Therefore it ought not to be ſupported. Nor is there any Neceſſity for it; For the *Poor* can *not ſuffer* by the Non-Payment of this Money. There are other Proviſions for raiſing the Money. *P. 1154.

This is a *Caſus omiſſus*: And *Lex non curat de minimis*, (as this is.) The Acts of Parliament give *no ſuch Power* to the Juſtices, as to grant ſuch a *Warrant*: And nothing can be *intended* in Favour of their Juriſdiction. It is for this Reaſon, that with regard to the Wages of Servants they are confined to Wages of Servants in *Huſbandry* only, and can not exerciſe ſuch Juriſdiction in reſpect to the Wages of other Servants.

As to any *inferred* Power, (for there is no expreſs Power) None can be pretended, but from 43 *Eliz. c.* 2: For 17 *G.* 2. *c.* 38. makes no Alteration in the Method of compelling Payment of the Rate.

It is not the *Thing* that is rated by 43 *Eliz. c.* 2. § 1. but only the *Perſon*, (the Occupier;) And Section 4 gives the Means of compelling it: And the *Occupier* alone is the Perſon there meant; And the Refuſal to contribute according to the Aſſeſſment made upon Him, is treated as an *Offence*; And the *Offender* is to be ſent to Goal. But the *Executor* or *Adminiſtrator* is *not* an *Offender*: It is a *perſonal* Charge. An Overſeer could not bring an *Action* for it, even againſt the *Perſon charged*: He muſt purſue the *particular* Remedy appointed by the Act. And if ſo, the Court will never *extend* the Remedy, againſt a *Repreſentative*.

If an Adminiſtrator ſhould pay this Rate, He might be guilty of a *Devaſtavit*. And the Compulſion by Diſtreſs will not alter the Caſe, or be an Excuſe for a *Devaſtavit*.

In what *Courſe* of Debt is this Rate to be ranked? How is the Adminiſtrator to know what *Preference* it is to have?

There is indeed a *legiſlative Expoſition* made, upon this head, in *another* Statute relating to the Poor Laws: I mean 17 *G.* 2. *c.* 38. § 3: Which provides a Remedy for the Caſe of the Death of an Overſeer who has Pariſh-Money in his hands; and gives the Preference of this Sort of Debt to all others; directing the Executors or Adminiſtrators of the Overſeer to pay it out of the Aſſets, "before *any* of "his other Debts are paid and ſatisfied."

Therefore, as the Legiſlature have made a Declaration in *that* Caſe, and *not* in *this*, It is plain that they did *not mean* ſo in this Caſe, but meant to leave it to the *ordinary* Courſe of Adminiſtration.

Mr.

* P.1155. * Mr. *Biſhop, contra,* for the Juſtices of Peace, and for the Pariſh Officers.

1ſt. The Court will not now enter into any Objection to the *Rate.*

The only queſtions therefore are as to the *Warrant*, and as to the *Aſſets being diſtrainable* in the Hands of the *Repreſentative.*

As to the Demand of the money upon *Veſey Himſelf*, It *was* made upon *Him*; and is ſo ſtated: And as to the Demand upon the *Repreſentative*, The End and Intention of this Special Caſe, was to ſettle the material Point the real Queſtion "Whether the Goods of the Perſon rated are or "are not diſtrainable in the Hands of the *Repreſentative.*"

The *Practice* is with Us, That they *are.* It is no Anſwer, to ſay That *other* People are *liable* to pay, if the Perſon rated *does not.* The Queſtion is, Whether the Repreſentative of the Perſon rated, is or is not liable.

The Authority to make this Warrant, and to make the Diſtreſs in Obedience to it, is founded upon the Stat. of 34 *Eliz. c.* 2. § 4. which gives this Remedy by Warrant and Diſtreſs, upon Refuſal to pay.

The *Demand* of the Money is to be made, and in the preſent Caſe was actually made *upon the Perſon aſſeſſed*: And that made it a *Debt* from *Him.* There was *no Need* of a Demand upon the *Repreſentative:* The *Aſſets* were already *become liable*, and *remained* ſo in his Hands.

As to the Danger of a *Devaſtavit.*—A Repreſentative could not be guilty of a *Devaſtavit*, even by paying a ſimple Contract Debt before a Bond Debt, *if he had no Notice* of the Bond-Debt: And the Diſtreſs made upon him would be a Juſtification to Him for paying it under the Compulſion of ſuch Diſtreſs. The Act of 17 *G.* 2 *c.* 38. § 3 makes a Debt of this Sort, payable before any other Debts of the deceaſed Overſeer.

I do not ſay, That the Executor or Adminiſtrator could be *ſent to Goal*, for Non-payment of this Debt: But yet, the *Aſſets* in his Hands are *diſtrainable*, as the *proper Fund out of which* it is to be paid; Eſpecially, as *no Action* would lie for it (as Mr. *Norton* agrees.)

Mr. *Norton*, in Reply—No anſwer at all has been given to my Objection to the *Rate itſelf.*

And

*And I ſay, that even if the Adminiſtrator were admitted to be liable to pay, yet ſtill there ought to have been a previous *Demand* upon him. *P. 1156.

No ſuch *Practice* as what Mr. *Biſhop* ſpeaks of is *ſtated* in the Caſe; And therefore the Court will intend That there is no ſuch: And I believe there *is None*. I never heard of it before: I take it to be directly the other Way.

And, at *all* Events, the *Poor* can not ſuffer: For there are other Perſons who muſt make up the Deficiency, in Caſe this Man do not pay.

This is ſcarce a *ſolvent* Eſtate; becauſe the Widow has renounced Adminiſtration, and it is granted to a Creditor.

This is a *Charge* upon the *Perſon*, which *dies with Him*: Like *Coſts* payable by One who dies; (for which a Bill, in the Court of Chancery, can not be revived; And ſo in this Court, upon Informations, they are gone by the *Death* of the Party.)

And the Adminiſtrator can not poſſibly know in *what Courſe* of Adminiſtration to pay this Rate. If an Executor or Adminiſtrator pays a Debt of a lower Nature, at that Time *knowing* of others of an higher, it is undoubtedly a *Devaſtavit*: And here there *may* be Debts of an higher Nature, which the Adminiſtrator may know of. And if He is obliged to pay it *under Compulſion*, He ought to pay it *without* Compulſion; And *vice verſâ*.

It is a *Charge* impoſed; not a Debt. The Caſe was * left open, upon its being ſtated at the Trial, to all or any other Objections that could be made upon the Face of it. There were Other Debts beſide this. *Mr. *Biſhop* denied this.

Mr. Juſt. DENISON.——That makes no Difference.

The Queſtion is ſtated particularly upon this Caſe; and is *confined* to the levying the Money upon the *Repreſentatives* of the Perſon charged.

I ſhould think the Event muſt have *often* happened, in Fact and Experience.

The *Practice* is *not ſtated*: But however, the Queſtion is What the *Law* is; *not* What the *Practice* is.

It

*P. 1157. * It is a Rule, "That upon a new Statute which pre-"ſcribes a particular Remedy; *No Remedy* can be taken, "but the particular Remedy *preſcribed* by the Statute." Therefore clearly, No Action of *Debt* will lie for a Poor's Rate.

This Remedy given by the Act of 43 *Eliz.* muſt be conſidered *with Analogy to other like* Caſes. This Statute conſiders the Perſon rated and refuſing to pay, as *an Offender*: And it gives no Authority but to diſtrain the *Goods of the* OFFENDER. Therefore No Goods are liable to be diſtrained, by the Words of this Act, but the Goods of the Offender Himſelf.

The Act of 17 *G.* 2. *c.* 38. § 3. is no inconſiderable Argument That there was *no* Remedy before the making of the Proviſion in that Act of 17 *G.* 2. *c.* 38. "That ſuch "Sort of Debts ſhould have a Preference of Payment, to "all others."

I never apprehended, that the Goods of the Perſon aſſeſſed to the Rate can be charged in the Hands of the Repreſentative. And therefore (as at preſent adviſed,) I ſhould think that this Action *will lie* for taking them.

I agree that this is in the Nature of an Execution: But yet it is *perſonal*; and I do not know that it is a *Lien* upon the Aſſets.

Mr. Juſt. WILMOT concurred; and ſaid He had no Doubt about it.

He thought, the Intention of the Special Caſe, which ſtates a particular Queſtion, appeared to be to ſubmit THIS *Queſtion* ONLY to the Court.

As to the Objections that have been made to the *Rate*, the firſt is of no great Importance: For though you can not make a Rate to reimburſe Overſeers; yet the Overſeer may immediately (whilſt in Office) reimburſe Himſelf, out of the next Money raiſed for the Rate.*

* See *Tawney's* Caſe, *ut ſupra, accord'*.

And as to the Second—He ſaid, He believed that whatever the † *Law* might be, the *Practice* was, not to make theſe Rates * Monthly.

† The Law ſeems to be, that they ſhould either be made Monthly, or at leaſt divided and diſtributed into ſo much *per* Month. *V. Juſtices of Tawney's* Caſe; and alſo *Tracey* v. *Talbot*, 2. *Salk.* 532. and *Rex* v. *Middleſex*, *Hil.* 9 *G.* 2. *B. R.*

On the Merits——It is *not expreſsly ſtated in the Caſe*, "that a Demand was made even upon *Veſey* (the Perſon "aſſeſſed,) and that *He* refuſed Payment:" Though it is ſo *recited in the Warrant*. But that is not material: For I have not the leaſt Doubt, but that the REPRESENTATIVE ought

* ought to have been *convened* before the Juſtices, and aſk- *P. 1158.
ed "What He had to ſay Why he ſhould not pay the "Rate aſſeſſed upon *Veſey* his Inteſtate." This Caſe ſeems to be like a *Scire facias* upon a Judgment; upon which, Execution can not be ſued out againſt the Repreſentatives, without aſking them what they have to alledge why it ſhould not be taken out.

At the Time of the Teſte, they were the *bona et catalla* of the Repreſentative. But if the Teſte had been prior to the Death, they would have been *bona et catalla* of the Deceaſed: But if teſted after his Death, they are not his *bona et catalla*; but the *bona et catalla* of the Repreſentative.

Therefore *if* the Money *had been demanded of the Repreſentative*, I ſhould have great Doubt Whether this Warrant and Diſtreſs would not have been good: For I can not think that by the Death of the Perſon charged with this Rate, the Aſſeſſment before made upon Him and demanded of Him would have been quite gone and loſt to the Pariſh, and could not have been any Way come at. For though it may be a Charge upon the *Perſon*, (as had been objected.) Yet it is a Charge upon Him *in reſpect to the Thing* occupied; And though He be called an *Offender*, if He refuſe to pay it, yet He can be *no otherwiſe* conſidered as an Offender, than every other Debtor who refuſes or neglects to pay his Debts, and thereby renders his Perſon and Goods liable to be taken in Execution, is ſo far treated as an Offender, till he ſhall comply with the Judgment awarded.

And in Experience, I know it to be the Caſe, that theſe Payments by Executors or Adminiſtrators are often allowed, (I dare ſay I have known it done 50 Times) to go in Diſcharge of the Aſſets of the Teſtator or Inteſtate. I do not ſay, in *what Courſe* of Adminiſtration of Aſſets: But it has been very often allowed, I am ſure; though I do not remember that it has been ſettled in what Courſe of Adminiſtration. Indeed it might be of too much Conſequence, to put it into the Power of Juſtices of Peace to determine upon the Adminiſtration of Aſſets, as to the Courſe in which they were to be adminiſtered.

In a Caſe of *Wallis, Adminiſtrator*, v. *Hewitt*, at *Guildhall*, at the Sittings after *Hil.* Term 5 G. 2. before Ld. Ch. Juſt. *Eyre*, in an Action of Treſpaſs, Two Aldermen of *London* had made a Warrant to diſtrain a Man for a Poor Rate. The Man died inteſtate: But before that, there had been a Demand made upon Him and Refuſal by Him, and a Warrant of Diſtreſs granted upon his Refuſal; And then He died—*Eyre* Ch. J. held that a Diſtreſs could not be made after his Death; Or if it could, yet the Repreſentative ought

to

* P. 1159. * to have been *ſummoned*: And He held the *Property to be changed*. A Caſe was made for the Opinion of the Court of Common Pleas: But I could not hear what became of it. Lord Ch. Juſtice *Eyre* was a great Lawyer.

It would be ſtrange, that a Diſtreſs ſhould be taken upon a Man's Goods without hearing Him: And it would make ſtrange Confuſion in the Adminiſtration of Aſſets. He may have paid or retained Judgment-Debts prior to this Diſtreſs for the Rate.

I've no Doubt that the Plaintiff here is intitled to his Judgment.

Mr. *Gould* was retained to take Notes for the Defendant. But he ſaid that if Mr. *Norton* inſiſted upon the Want of a Demand from the *Repreſentative*, He could not pretend to maintain the Caſe on the Part of the Defendants.

Mr. Juſt. DENISON and Mr. Juſt. WILMOT ſaid, That was an *eſſential* Circumſtance.

Per Cur. unanimouſly,
RULE for the POSTEA to be delivered to the PLAINTIFF.

Small, ex dimiſſ. Baker, *verſ.* Cole and Skinner.

THIS was a Caſe in EJECTMENT, *after a Verdict* for the Plaintiff.

On *Saturday* the 11th of this Month, Mr. *Norton*, on Behalf of the Defendant, moved in *Arreſt of Judgment*; for that the Leaſe declared upon was, on the Face of it, *void*; being laid to be made in the *thirty-third* Year of King *George* the *Third*, "To hold from the Quarter-Day then "laſt paſt;" an *impoſſible Time* at preſent, as it is now but the *firſt* Year of his preſent Majeſty's Reign.

The Fact was that the Pleadings were intitled of *Hilary* Term in the 1ſt Year of King *George* the *Third*; And the Leaſe is laid to be made "in the 33d Year of the SAID "King; To hold *ut ſupra*:" Which he alledged to be a *fatal* Objection to the very *Title* of the Plaintiff; and that it can *not* be AMENDED in this Suit of *Ejectment*.

A Rule was then made, to ſhew Cauſe: And

Mr. *Gould*, on behalf of the Plaintiff, now ſhewed Cauſe why the Judgment ſhould not be arreſted.

He

* He agreed the State of the Caſe to be, that the *Placita* were of *Hilary* Term in the firſt Year of *George* the *Third*; And that it was alledged in the Declaration, that the Defendant entered &c "againſt the Peace of our *ſaid* "Lord the King;" And that it lays the *Demiſe* to have been made on the 30th of *May* in the *thirty-third* Year of His SAID Majeſty. *P.1160.

But He anſwered and obſerved, 1ſt. That this is *after a Verdict*: 2dly. That it is *aided* and aſſiſted by ſome or One of the Statutes of *Jeofails*; and therefore ſhall not be regarded by the Court, but altogether *diſregarded* and overlooked.

Firſt—An Ejectment being a *fictitious* Action, and the Defendant confeſſing Leaſe Entry and Ouſter, He conſequently confeſſes a Leaſe SUFFICIENT *to bring the Title in Queſtion*: And it muſt be a Leaſe of a *ſubſiſting* Term. But as there could be *no* 33d Year of THIS King therefore the Court will apply thoſe Words, "the 33d Year," *ſecundum ſubjectam materiam*, when it comes before them AFTER *a Verdict*.

In 2 *Strange* 1011. *Rex* v. *Biſhop of Landaff*, in a *Quare Impedit*; a Verdict was ſolemnly determined to have cured the Want of alledging a Preſentation. And if this be conſidered as an *impoſſible* Day, then the Leaſe took Effect from the *Delivery* of the Deed. In the Caſe of *Acton* v. *Eels*, 2 *Salk.* 662. It was held to be a Time impoſſible, and as if no Day at all had been alledged: And Judgment was given for the Plaintiff.

Secondly—It is aided by the Statute of *Jeofails*. The 32 *H.* 8. *c.* 30. §. 1. cures it, as a Jeofail; being after a Verdict. This can be no more than a mere *Jeofail*; 'Tis a mere Miſpriſion of the Clerk: Therefore the Court will overlook it, and give Judgment *without any regard* to it. 2 *Strange* 1011. *Rex* v. *Biſhop of Landaff*, is in Point ſo.

Beſides, it may be AMENDED. In the Caſe of *Mutlit* v. *Denny*, 2 *Strange* 807. A Declaration in Ejectment was amended after a Verdict for the Plaintiff; though there was nothing to amend by; on the Authority of *Cro. Jac.* 306. and 1 *Salk.* 48. *pl.* 5. Biſhop of *Worceſter*'s Caſe. And if it may be amended without any Thing to amend by, the Court will ſurely *over-look* it, and not arreſt Judgment upon ſuch a trifling Objection.

Mr. *Norton* and Mr. *Burland* were of Counſel for the Defendant. They inſiſted that this *Title*, made upon the Plaintiff's own Declaration, is ſuch as he *cannot recover upon*: For it appears upon the very Face of it, "that He has *No* "Title at all."

The

*P. 1161. * The *Confeſſion* of Leaſe Entry and Ouſter *only* confeſſes that there was in Fact *ſuch* a Leaſe as is *ſet out in the Declaration*. But *if* that be a *bad* Leaſe, it may ſtill be taken Advantage of: As, for Inſtance, where the Leaſe appears not to commence till after the Action brought.

And the *Intendment after Verdict* goes no further than to ſuppoſe that every Thing was actually proved, which *ought* to have been proved. But this is, at this Time, an *impoſſible Leaſe*. It is an *eſſential defect in the Demiſe:* And therefore it is neither aided by the *Verdict* or by any Statute of *Jeofails*. This Leaſe laid in the Demiſe could not have been proved upon the Trial. If it ſhould be ſuppoſed that a Leaſe, to commence from the 30th of *May* in the *firſt* Year of the Reign of *George* the Third, had been proved, it would have been a *Variance* from the Declaration: And if it really was a Leaſe dated as it is laid in the Declaration, Such a Leaſe would give the Plaintiff no Sort of Title.

This is *not abſolutely* and at all Events, an *impoſſible Date*; but only a *future* Date: It may be a good Title *hereafter*; though it is *not* ſo *now*, as the Time alledged is not *yet* come. So that the Plaintiff's Action is brought *before his Term is commenced*. And an Ejectment can *not be* AMENDED; because it is the *original Proceſs*; And the original Proceſs can *never be amended*. So is 1 *Ld. Raym.* 728. * And there, (by the Way,) the Court *compelled* the Defendant to confeſs Leaſe Entry and Ouſter, though it was objected "that "the Plaintiff could not have Judgment, though the Ver- "dict was given for him." In 1 *Shower* 206, 207. in the Caſe of *Bennet* v. *Gawdey*, Ld. Ch. J. *Holt* held the Declaration in Ejectment *not amendable*; and that *no other* Leaſe is confeſſed, but what is *laid* in the Declaration. In 2 *Barnes* 153. *Roe.* v. *Doe, ex dimiſſ' Stevenſon*—The Demiſe laid in the Declaration can *not* be *amended*. 2 *Barnes* 13. † is in Point alſo.

* *V. Carthew* 401. and 1 *Salk.* 48. *pl.* 6. S. C. by the Name of *Puleſton* verſ. *Warburton. P.* 9 *W.* 3. B. R.

† *Driver, on the Demiſe of Scrutton* v. *Scrutton et al'.*

They alſo cited *Yelv.* 182. ‡ *Davis* v. *Purdy*.

‡ But there it was "*eadem* "menſis "Maij anno 6to *ſupradicto.*"

Mr. *Gould* was proceeding to reply: But

§ Lord MANSFIELD and Mr. Juſt. FOSTER were Both abſent.

The § COURT told Him, there was no Occaſion to trouble Himſelf.

Mr. Juſt. DENISON—To be ſure, You can ‖ not alter the TITLE, if it be defective: But this is only a Title *defectively or improperly* SET OUT. There can be no Doubt but that a PROPER Title was *proved at the Trial*.

‖ *V.* 2 *Strange* 1011. S. P. *accord'.*

IF

*If the Demiſe had been laid "in the 33d Year of his "*late* Majeſty," undoubtedly in that Caſe, the Court would have *ſupplied* the Words "King *George* the Second." And this ſeems to be juſt ſuch a *Kind* of Defect as that would have been. *P. 1162.

This is *not an uncertain* Deſcription; but only a Title *defectively ſet out*, by the mere *Miſtake of the Clerk*. And being in *Ejectment*, there is the more Reaſon for our overruling this nice Objection.

I think there is *no Need of any Amendment* at all.

Mr. Juſt. WILMOT was very clear in the ſame Opinion: And He ſaid, It was ſo plain a Caſe, that there was no Occaſion to uſe many Words about it. Therefore He would only declare his entire Concurrence, that the Rule ſhould be diſcharged.

Per Cur. THE RULE was DISCHARGED.

Rex *verſ.* Palmer and Baine Eſquires, et al'.

Wedneſday 22d April 1761.

UPON ſhewing Cauſe Why an Information ſhould not be granted againſt two Juſtices of Peace and Others, for a Miſdemeanour, relating to the Conviction of a Poacher, and the Circumſtances attending it;

THE COURT thought proper, upon fully hearing and conſidering all the Affidavits and what was urged by the Counſel on both Sides, to *diſcharge* the Rule, as to *All* the Defendants; with COSTS *to be paid to the* JUSTICES, but without Coſts as to the *Others*.

And They were, upon this Occaſion, moſt explicit in their Declaration, "That even where a Juſtice of Peace "acts *illegally*," (which however, was not the preſent Caſe,) "Yet if he has acted *honeſtly* and candidly, *without* Op"preſſion, Malice, Revenge, or any bad View or *ill In*"*tention* whatſoever, The Court will never puniſh Him in "this *extraordinary* Courſe of an INFORMATION; but "leave the Party complaining, to the *ordinary* legal Reme"dy or Method of Proſecution, by Action or by In"dictment."

*P. 1163. * Rex *verſ.* Vipont and Others.

Wedneſday 29th April 1761.

THIS was a Conviction that ſtood in the Crown-Paper, and was as follows,—Borough of *Derby*, to wit. Be it remembered that on &c, at &c, *Thomas Eaton* of the ſaid Burrough Hoſier and *Wool-comber cometh* before Us *Joſeph Bingham* Eſq; Mayor of the ſaid Burrough, and *John Smith* Gentleman, Two of His Majeſty's Juſtices of the Peace of and for the ſame Burrough, and upon his Oath before Us *depoſed*, That *Joſeph Vipont*, *Henry Greatorex*, *John Hall*, *Edward Chapman*, , and *Thomas Allen*, *Journeymen-Wool-combers*, who for ſome months next before their Leaving his Service as herein after is mentioned, were *employed by the ſaid Thomas Eaton in the Wool-combing Buſineſs*, to work for him at reaſonable Wages, *had*, Each for Himſelf, at the ſaid Burrough, CONFESSED TO HIM, "*That they had* in the Month of *November* laſt paſt, at "the ſaid Burrough, AGREED *One amongſt Another* AND "WITH OTHER *Journey-men Wool-combers, to* RAISE "*and* ADVANCE *their* WAGES, and that they *would* "*not work with* HIM *or any* OTHER *Maſter* in the Wool-"combing Buſineſs, *unleſs* He and They would *advance* "their Wages;" And that the ſaid *Thomas Eaton* thereupon refuſed ſo to do; And thereupon, All his ſaid Journeymen *refuſed to work* for Him at their former reaſonable Wages, and *had left his Service*. Whereupon, the ſaid *Joſeph Vipont*, *Henry Greatorex*, *John Hall*, *Edward Chapman*, and *Thomas Allen*, *apearing before Us* to anſwer the ſaid Charge; and *having* HEARD *the ſaid* CHARGE: and, *in the Preſence of the ſaid Thomas Eaton*, being *called upon* by Us to ſhew Cauſe Why they ſhould not be convicted for unlawfully entering into ſuch Combination as aforeſaid contrary to the Statute in that Caſe made and provided; And *having Nothing to ſay*, nor being *able to make out* any thing whereby to defend themſelves before Us touching and concerning the Premiſes aforeſaid; Thereupon the aforeſaid *Joſeph Vipont*, *Henry Greatorex*, *John Hall*, *Edward Chapman*, and *Thomas Allen*, the Day and Year aforeſaid, *by the Oath of the ſaid Thomas Eaton*, a credible Witneſs, ARE CONVICTED before Us for unlawfully entering into ſuch Combination as aforeſaid, at the ſaid Burrough of *Derby*, to raiſe and advance their Wages in the Wool-combing Buſineſs there, contrary to the Acts of Parliament in that Caſe made and provided. Given under our Hands and Seals &c.

This was a Conviction on the Act of 12 *G.* 1. *c.* 34. "to "prevent unlawful Combinations of Workmen employed in "the Woollen Manufactures, and for better Payment of "their Wages."

Mr.

* Mr. Serj. *Davy*, on Behalf of the Defendants, objected to it ; * P. 1164.

1ſt. That *No Evidence* is ſtated to have been *given in the* PRESENCE *of the Defendants* ; Only, the Charge was READ *to them*, in the Preſence of the Proſecutor *Thomas Eaton*, the Witneſs : But it was not made out and proved by him *vivâ voce* before them, though they *perſonally appeared*, and conſequently had a Right of *Croſs-examining* the Witneſſes, upon their giving verbal Evidence Face to Face ; Nor indeed is any Evidence at all *ſet out* with ſufficient Particularity and Preciſeneſs.

2d Objection—This *Fact*, as charged, is NOT *an Offence within* the * Statute. Theſe People were all of them *Journeymen to the ſame Maſter* at Home ; and *not* Perſons aſſembled and FORMED *into* UNLAWFUL CLUBS *or* UNLAWFUL SOCIETIES † abroad. Which he would have had it underſtood that the Statute required. And there was *no* WRITTEN Agreement, no Reſolution " not to work " with Him or any *other* Maſter for ſuch Wages."

* See the Preamble and the whole firſt Section.

† But the Words of the Charge are " that " they had " agreed one amongſt another and with other Journey-men Wool-combers." *Vide ante* 1163.

3d Objection .—— Here is *no judgment :* It is only ſaid " That they are *convicted* for unlawfully entering into ſuch " Combination." It ought to proceed " *quod forisfaciat*," and expreſsly ADJUDGE *the Forfeiture*. So is 2 *Strange* 858. 3 *G.* 2. in * *Rex* v. *Hawks* ; Where a Conviction for killing a Deer was quaſhed, becauſe it was only " *convictus eſt*," without any Judgment " *quod forisfaciat*."

* *V. Fitz.* G. 124. S.C.

They ought to have awarded the particular Puniſhment ; as the Act does not fix the Duration of the Puniſhment, but leaves the Time of the Impriſonment quite diſcretionary, " for any Time not exceeding 3 Months." Therefore this Caſe differs widely from Caſes where the Puniſhment is *aſcertained* and *neceſſarily flows from* the Conviction.

THE COUT having immediately over-ruled the 2d Objection, as a frivolous One, and not to be ſeriouſly ſupported,

Mr. *Caldecott*, *contra*, for the Plaintiff, applied Himſelf to anſwer the firſt and third Objections.

1ſt. It ſufficiently appears on the Face of the Conviction, that the Defendants HEARD the ‖ Evidence. However, it is *not neceſſary* that the Evidence ſhould be *given in the* PRESENCE *of the Defendants:* For which He cited *Rex* v. *Baker*, 2 *Strange* 1240 in Point, as *He* ſaid *for* Him ; but quite otherwiſe, as the Serjeant * alledged and as the Court

‖ But the Words are only, " having heard the ſaid CHARGE."

* Notwithſtanding this Allegation and Explanation, the Caſes ſeem very much alike. And One of the Judges expreſsly ſaid " that He knew no Law that *requir*-" *ed* the Preſence of the Witneſs Face to Face ;" And another ſaid that " perhaps " it had been ſufficient without either of the Words *read*, or heard, It being alledg-" ed that the Matter was *fully underſtood* by the Defendant."

*P. 1165. * alſo explained it. And He obſerved that *this* Conviction is as much in the *preſent* Tenſe, as that was; The Words of it are "They *are* convicted."

As to the 3d Objection—The Juſtices have Nothing to do but to *convict: That* is the Judgment. Then *after* the Conviction, the Juſtices exerciſe their Diſcretion: Which they *did* here, by committing them for three Months.

Mr. Serj. *Davy*, in Reply—1ſt. The Caſe of *Rex* v. *Baker* proves directly contrary to Mr. *Caldecott's* Application of it. For there, the Court took it to *be* a Hearing IN the Preſence of the Defendants: They there ſuppoſed the Whole to paſs at the very *ſame* Time. Here it is manifeſted that they were *not* preſent, at the Time, when *Thomas Eaton* gave his Evidence.

Lord MANSFIELD ſtopt him; it being unneceſſary to ſay any more about enforcing the Objections, ſince the firſt and third were fatal.

1ſt. The Evidence ought to be taken over again, *in a Defendant's Preſence*, unleſs he confeſſes. Now here they do not confeſs before the *Juſtices*: And the Evidence only is "That they had formerly confeſſed this Combination, to "the *Witneſs*." And in the Caſe of *Rex* v. *Baker*, This Court went upon the Suppoſition, "That the Defendant "*was preſent* when the Evidence was given, and did *actually hear it given*."

In a Conviction, the Evidence muſt be *ſet out*; that the Court may judge of it: And it muſt be *given in the Preſence of the Defendant*, that He may have an Opportunity of *Croſs-examining*.

3d Objection— Here, the Puniſhment is *diſcretionary* as to the *Length* of the Time of Impriſonment: And here is *no Judgment* at all; only a Conviction. They ought to have gone on, and *adjudged* the Forfeiture. Therefore on both theſe Objections, this Conviction ought to be quaſhed: For, however uſeful a Statute this may be, for the Benefit of Trade, Yet the Juſtices muſt convict according to *Law*.

Mr. Juſt. DENISON concurred in both Points.

1ſt. The Evidence muſt be given in the *Preſence* of the Defendant, that he may have an Opportunity to croſs-examine.

In the Caſe of *Rex* v. *Baker* Nothing wrong appeared upon the *Face* of the Conviction: And therefore the Court ſuppoſed and took it to have been *rightly* tranſacted.

As

* As to the 3d Objection—The Time, the Duration of the Commitment ought to be *aſcertained* upon the Conviction. The Statute does not fix it: It only ſays "for any "Time *not exceeding* three Months." * P. 1166.

Mr. Juſt. WILMOT concurred in Both.

1ſt: The Witneſſes ought to be examined *in the Preſence of* the Party accuſed; that he may have the Benefit of *Croſs-Examination*. And here it appears plainly enough, that *Eaton* the Witneſs againſt theſe Defendants was *not* ſo examined in their Preſence.

As to the 3d Objection—A conviction is equal to a *Verdict and Judgment*. But this is a Verdict without a Judgment.

In the Caſe of *Rex* v. *Hawkes*, *H.* 3 *G.* 2 *B. R.* It was ſettled "That there *muſt* be a Judgment of Forfeiture." I have a full Note of that Caſe: It was a Conviction for Deer-Stealing, on 3, 4 *W. & M. c.* 10. And there, though the Penalty was *certain*, (a Forfeiture of 20*l.* for every Offence in mere hunting, and if a Deer be killed wounded or taken, then 30*l.*) and though the act of Parliament diſtributes the Forfeiture; Yet it was holden "That "there muſt be a *Judgment* to levy it: For every Execution muſt be *founded* on a Judgment. The Caſes of *Regina* v. * *Wingrave*, *H.* 2 *Ann. B. R.* and *Regina* v. *Serle* in *B. R.* were there both quoted by Mr. *Fazakerly* in § Support of the Execution.

* Or *Winſgate*.

§ Yet See 1 *Salk.* 378. *pl.* 23. *King* v. *Chandler*. *M.* 1 *Ann. B. R.* moſt directly in Point to the contrary, in a Conviction on the very ſame act of Parliament.

There was a Caſe in *Tr.* 9. *G.* 3. *B. R. Rex* v *Aſhton*, upon a conviction for deſtroying Hares, contrary to 1. *G.* 1. *c.* 48. The Words of the Conviction were "Igitur con-"ſideratum eſt per Nos, *quod convictus eſt*." The Court held "That there ought to be a *Judgment quod* FORIS-"FACIAT, or quod ‖ *committatur &c.*"

‖ For that Act gives no *pecuniary* Forfeiture.

But *this* is a much ſtronger Caſe; becauſe here is a *Diſcretion* to commit either to the *Houſe of Correction*, there to remain and be kept at hard Labour for any Time *not exceeding* three Months; or *to the Common Goal of the County, &c. as they ſhall ſee Cauſe*, there to remain without Bail or Mainpriſe, for any Time *not exceeding* 3 *Months*.

Per Cur. unanimouſly and clearly,
The CONVICTION muſt be QUASHED.

Lewis.

* P. 1167. * Lewis and Another *verſ.* Rucker.

Saturday 2d *May* 1761. A Rule having been obtained by the Plaintiffs (the Inſured) for the Defendant (the Inſurer) to ſhew Cauſe why a Verdict given for the Defendant ſhould not be ſet aſide and a new Trial had,

The Court, after hearing the Matter fully debated by the Counſel on both Sides, took time to adviſe.

And Lord Mansfield now delivered their Reſolution. In doing which, He ſtated every Thing requiſite to be known, in ſo full and ample a Manner as to render it quite unneceſſary and even impertinent for Me to pretend to prefix any Preface or introduction to it.

What he ſaid was to the following Effect—

This was an action brought upon a Policy, by the Plaintiffs, for Mr. *James Bourdieu*, upon the Goods aboard a Ship called the *Vrow Martha*, at and from *St. Thomas Iſland* to *Hamburgh*, from the Loading at *St Thomas Iſland* till the Ship ſhould arrive and land the Goods at *Hamburgh*.

The Goods (which conſiſted of Sugars, Coffee, and Indigo,) were valued at 30*l. per* Hogſhead, the clayed Sugars, and 20*l. per* Hogſhead the *Muſcavado* Sugars: And the Coffee, and Indigo were likewiſe reſpectively valued. The Sugars were warranted free from Average under 5*l. per Cent.* and all other Goods, free from Average under 3*l. per Cent.* unleſs Cargo of the Ship be ſtranded.

In the Courſe of the Voyage, the Sea Water got in; and when the Ship arrived at *Hamburgh*, it appeared that every Hogſhead of Sugar was damaged. The Damage the Sugars had ſuſtained made it neceſſary to ſell them immediately; and they were accordingly ſold: And the difference between the Price which they brought by reaſon of the Damage, and that which they might then have been ſold for at *Hamburgh*, if they had been ſound, was as 20*l.* 0*s.* 8*d. per* Hogſhead is to 23*l.* 7*s.* 8*d. per* Hogſhead; (*i. e.* If ſound, they would have been worth 23*l.* 7*s. per* Hogſhead; as damaged, they were only worth 20*l.* 0*s.* 8*d.* a Hogſhead.)

The Defendant paid Money into Court, by the following Rule of eſtimating the Damage: He paid the like Proportion of the Sum at which the Sugars were *valued in the Policy*, as the Price of the damaged Sugars bore to ſound Sugars at *Hamburgh* (the

*(the Port of Delivery.) All this was admitted at the Trial; *P. 1168.
though perhaps upon an accurate Computation, there may be a Miſtake of about 17*s.* upon the Money paid in. But no Advantage was attempted to be taken of this Slip, at the Trial: It was admitted That the Money paid in was ſufficient, *if* the *Rule* by which the Defendant eſtimated the Loſs was *right*; and the only Queſtion at the Trial was, "By *what* Meaſure or Rule the Damage, (upon all the "Circumſtances of this Caſe,) ought to be eſtimated."

To diſtinguiſh this Caſe, under its *particular Circumſtances*, out of any *general* Rule, the Plaintiff's Counſel called Mr. *Samuel Chollett*, Clerk to Mr. *Bourdieu*: Who proved That upon the 15th of *February*, (the Time of the Inſurance,) Sugars were worth at *London* and *Hamburgh* 35*l.* a Hogſhead: That the propoſals of a Congreſs to be holden, and the Expectation of a peace, had on a ſudden ſunk the Price of Sugars; That before the Ship arrived at *Hamburgh*, and before he could know that the Sugars had received any Damage, Mr. *Bourdieu* had ſent Orders "that the Sugars ſhould "be houſed at *Hamburgh*, and *kept* till the Price ſhould riſe "above 30*l.* a Hogſhead;" That He had many hundred Hogſheads of Sugar lying at *Amſterdam*, to which Place He ſent the like Orders; That in Fact, the Congreſs not taking Place, Sugars roſe 25*l. per Cent.* That what he ſold of the Sugars he had at *Amſterdam* brought 30*l. per* Hogſhead and upwards; That he *might* have ſold theſe Sugars at the ſame Price, if they had been *kept* according to his Orders; And the only Reaſon why they were not kept was, Becauſe they were rendered periſhable from the Sea-Water which had got in. Therefore, ſaid they, the Neceſſity of an immediate Sale and the Conſequence thereof ought to be *computed into the Damage*.

The ſpecial Jury, (amongſt whom there were many knowing and conſiderable Merchants,) found the *Defendant's* Rule of Eſtimation to be right, and gave their Verdict for him. They underſtood the Queſtion very well, and knew more of the Subject of it than any Body elſe preſent; and formed their Judgment from their own Notions and Experience, without much Aſſiſtance from any thing that paſſed.

The Counſel for the Plaintiff, in the Outſet, chiefly reſted upon the *particular* Circumſtances of this Caſe.

The Counſel for the Defendant offered to call Witneſſes to prove the *General Uſage* of eſtimating the Quantity of Damage where Goods are injured.

I was at firſt ſtruck with the Argument "That the im-"mediate *Neceſſity of ſelling* in this Caſe might be taken into "Conſideration, as an *Exception* to the General Rule;" and propoſed

*P. 1169. * propoſed that the Cauſe might be left to the Jury upon *that* Point. Then Mr. *Winn*, for the Defendant, argued "the Neceſſity of ſelling, and the Conſequence there-"of, *ought not to be regarded:*" And what He ſaid had ſo much Weight, that it very much changed my way of thinking.

There was Nothing to ſum up: But the Jury aſked Whether I would give them any *Directions*. I ſaid, I left it to them, "Whether the Difference between the ſound and the "damaged Sugars at the Port of Delivery ought to be the "Rule:" Or, "Whether the Neceſſity of an immediate "Sale, (certainly occaſioned by the Damage,) and the Loſs "thereby, ſhould be taken into Conſideration." I told them, though it had ſtruck me at firſt, that this Caſe might be an Exception; yet, what the Counſel for the Defendant had ſaid to the Contrary ſeemed to have great Weight.

The Counſel for the Plaintiff, not having replied nor gone into the general Argument, upon an Apprehenſion that my Opinion was with them upon the particular Circumſtances of this Caſe were diſſatisfied with the Verdict; and ſaid they would try the other Cauſe in the Paper upon the ſame Policy: But, inſtead of that, They have moved for a new Trial in this Cauſe; (which I am extremely glad of.)

No Fact is diſputed: The only Queſtion is, "Whether "(All the Facts being agreed,) the Jury have eſtimated the "Damage by a *proper Meaſure.*"

To make the Matter more intelligible, I will firſt ſtate the Rule by which the Defendant and Jury have gone; and then I will examine whether the Plaintiff has ſhewn a better.

The Defendant takes the PROPORTION of the Difference between ſound and damaged at the Port of Delivery, and pays *that Proportion* upon the *Value* of the Goods *ſpecified in the Policy*; and has *no regard to the Price in Money* which either the ſound or damaged Goods bore in the Port of Delivery. He ſays the Proportion of the Difference is *equally* the Rule, whether the Goods come to a *riſing* or a *falling* Market. For inſtance, ſuppoſe the Value in the Policy 30*l.*—they are damaged, but ſell for 40*l.* if they had been ſound, they would have ſold for 50*l.*—the Difference is a fifth: The Inſurer then muſt pay a fifth of the *prime Coſt*, or *Value in the Policy*, (that is 6*l.*) *E converſo*;——If they come to a loſing Market, and ſell for 10*l.* being damaged, but would have ſold for 20*l.* if ſound, the Difference is one half: the Inſurer muſt pay half the *prime Coſt*, or *Value in the Policy*, (that is 15*l.*)

To

* To this Rule Two Objections have been made. * P. 1170.

1ſt Objection. That it is going by a *different Meaſure* in the Caſe of a *Partial*, from that which governs in the Caſe of a *total* Loſs: For, upon a total Loſs, the prime Coſt, or Value in the Policy muſt be paid.

Anſwer. The Diſtinction is founded in the Nature of the Thing. Inſurance is a Contract of Indemnity againſt the Perils of the Voyage: The Inſurer engages, ſo far as the Amount of the prime Coſt, or Value in the Policy, "that "the Thing ſhall come ſafe;" He has nothing to do with the Market: He has no Concern in any Profit or Loſs which may ariſe to the Merchant from the Goods; If they be *totally* loſt, He muſt pay the prime Coſt, that is, the Value of the Thing he inſured, at the *Outſet*; He has no Concern in any *ſubſequent* Value.

So likewiſe, if Part of the Cargo, capable of a ſeveral and diſtinct Valuation at the Outſet, be *totally* loſt: As if there be 100 Hogſheads of Sugar and 10 happen to be loſt, the Inſurer muſt pay the *prime* Coſt of thoſe 10 Hogſheads, without any Regard to the Price for which the other 90 may be ſold.

But where an entire individual, as one Hogſhead, happens to be *ſpoiled*, no Meaſure can be taken from the prime Coſt to aſcertain the Quantity of *ſuch* Damage: But if you can fix whether it be a 3d, 4th or 5th worſe, the Damage is fixed to a Mathematical Certainty. How is this to be found out? Not by any Price at the *Outſet* Port: but it muſt be at the Port of *Delivery*, where the Voyage is completed, and the whole Damage known. Whether the Price there be high or low, in either caſe it *equally* ſhews whether the damaged Goods are a third, a fourth or a fifth worſe than if they had come ſound; conſequently, whether the Injury ſuſtained be a third, fourth or fifth of the Value of the Thing: And, as the Inſurer pays the *whole prime Coſt*, if the Thing be *wholly loſt*: ſo, if it be only a 3d, 4th or 5th *worſe*, He pays a 3d, 4th or 5th of the *Value* of the Goods ſo *damaged*.

2d Obj. The next Objection with which this Caſe has been much intangled, is taken from this being a *valued* Policy.

I am a little at a Loſs to apply the Arguments drawn from thence. It is ſaid "that a *valued* is a *Wager* Policy, (like "Intereſt or no Intereſt:) If ſo, there can be *no Average* "Loſs, and the Inſured can only recover as for a *total*, a-"bandoning what is ſaved, becauſe the Value ſpecified is "fictitious."

Anſw;

* P. 1171. * Anſw. A valued Policy is *not* to be conſidered as a Wager Policy, or like "Intereſt or no Intereſt:" If it was, it would be void by the Act of 19 G. 2. c. 37. The only Effect of the Valuation is *fixing the Amount of the prime Coſt*; juſt as if the Parties *admitted* it at the Trial: But in every Argument, and for every other Purpoſe, it muſt be taken that the Value was fixed in *ſuch a Manner* as that the Inſured meant only to have an Indemnity.

If it be under-valued, the Merchant himſelf ſtands Inſurer of the Surplus. If it be *much over-valued*, it muſt be done with a bad View; either to gain, contrary to the 19th of the late King; or with ſome View to a fraudulent Loſs: Therefore the Inſured never can be allowed in a Court of Juſtice to plead that He has *greatly* over-valued, or that his Intereſt was a *Trifle* only.

It is ſettled, "that upon valued Policies, the Merchant "need only prove *ſome* Intereſt, to take it out of 19 G. 2: "Becauſe the adverſe Party has *admitted* the Value; and if "more was required, the agreed Valuation would ſignify "Nothing." But if it ſhould come out in Proof, that a Man had inſured 2000*l.* and had Intereſt on board to the Value of a Cable only; there never has been, and I believe there never will be a Determination, that by ſuch an *Evaſion* the Act of Parliament may be defeated.

There are many Conveniencies from allowing valued Policies. But where they are uſed merely as a *Cover* to a Wager, they would be conſidered as an *Evaſion*.

The Effect of the Valuation is only fixing concluſively, the prime Coſt. If it be an open Policy, the prime Coſt muſt be proved: In a valued Policy, it is *agreed*.

To argue "that there can be no Adjuſtment of an Ave-"rage-Loſs upon a valued Policy," is directly contrary to the very *Terms* of the Policy itſelf. It is expreſsly *ſubject to Average*, if the Loſs upon Sugars exceed 5*l. per Cent.* If it was not, the Conſequence would not be, that every partial Loſs muſt thereby become total: But the Event, to intitle the Inſured to recover, would not happen, *unleſs* there was a total Loſs. Conſequently, the Plaintiffs in this Caſe would not be intitled to recover *at all*: For there is no Colour to ſay this *was* a total Loſs. Beſides, the Plaintiffs have taken to the Goods, and ſold them.

In Oppoſition to the Meaſure the Jury have gone by, the Plaintiffs contend, that they ought to be paid the whole Value in the Policy, upon One of *two* Grounds.

1ſt. Be-

* 1ſt. Becauſe the General Rule of eſtimating ſhould be the Difference between the *Price the damaged Goods ſell for*, and the *prime Coſt* (or Value in the Policy.) Here, the damaged ſold at 20*l.* 0*s.* 8*d. per* Hogſhead: And the Under-Writer ſhould make it up 30*l.* * P.1172.

Anſw. It is impoſſible this ſhould be the Rule. It would involve the Under-Writer in the *Riſe* or *Fall* of the *Market*: It would ſubject him, in ſome Caſes, to pay *vaſtly more than the Loſs*; in Others, it would deprive the Inſured of *any Satisfaction, though there was a Loſs.*

For Inſtance,—Suppoſe the prime Coſt or Value in the Policy 30*l. per* Hogſhead; the Sugars are injured; the Price of the Beſt is 20*l.* a Hogſhead; the Price of the damaged is 19*l.* 10*s.*—The Loſs is about a fortieth, and the Inſurer would be to pay above a third.

Suppoſe they come to a riſing Market, and the ſound Sugars ſell for 40*l.* a Hogſhead; and the damaged for 35*l.* the Loſs is an Eighth; yet the Inſurer would be to pay Nothing.

The 2d Ground upon which the Plaintiff contends that the 30*l.* ſhould be made up, is, that it appears the Sugars *would* have ſold for that Price, if the Damage from the Sea-Water had not made an immediate Sale neceſſary.

The Moment the Jury brought in their Verdict, I was ſatisfied that they did right, in totally diſregarding the particular Circumſtances of this Caſe: And I wrote a Memorandum, at *Guild-hall* in my Note-Book, "that the Verdict "ſeemed to me to be right."

As I expected the other Cauſe would be tried, I thought a good Deal of the Point, and endeavoured to get what Aſſiſtance I could by converſing with ſome gentlemen of Experience in Adjuſtments. The Point has now been very fully argued at the Bar; and the more I have thought, the more I have heard upon the ſubject, the more I am convinced that the Jury did right to pay no regard to theſe Circumſtances.

The Nature of the Contract is, "that the Goods ſhall "come ſafe to the Port of Delivery; or if they do not, to "indemnify the Plaintiff to the Amount of the prime Coſt, "or Value in the Policy." If they arrive, but leſſened in Value through Damages received at Sea, the Nature of an Indemnity ſpeaks demonſtrably, that it muſt be by putting the Merchant in the ſame Condition, (Relation being had to the prime Coſt or Value in the Policy,) which He would have been

*P. 1173. * been in if the Goods had arrived *free* from Damage; that is, by paying ſuch *Proportion*, or *aliquot Part* of the *prime Coſt, or Value in the policy*, as *correſponds* with the Proportion, or *aliquot Part* of the Diminution in Value occaſioned by the Damage.

The Duty accrues upon the Ship's *Arrival and Landing her Cargo at the Port of Delivery:* The Inſured has *then* a Right to demand Satisfaction. The Adjuſtment never can depend upon *future* Events or Speculations. How long are they to wait? a Week, a Month or a Year?

In this Caſe, the Price roſe: but if the Congreſs had taken Place, or a Peace had been made, the Price would have fallen. The Defendant did not inſure "that there ſhould be "no Congreſs or Peace." It is true, Mr. *Bourdieu* acted upon political Speculation, and ordered the Sugars to be kept till the Price ſhould be 30*l.* or upwards: But no private Scheme or Project of Trade of the Inſured can affect the Inſurer; He knew nothing of it. The Defendant did not undertake that the Sugars ſhould bear a Price of 30*l.* a Hogſhead.

If ſpeculative Deſtinations of the Merchant, and the Succeſs of ſuch Speculations were to be regarded, it would introduce the greateſt Injuſtice and Inconvenience. The Under-writer knows Nothing of them. The Orders here were given after the Signing of the Policy. But the deciſive Anſwer is, That the Under-writer has Nothing to do with the *Price*; and that the Right of the Inſured to a Satisfaction, where Goods are damaged, ariſes immediately upon their being *landed at the Port of Delivery*.

We are of Opinion that the Plaintiffs are *not* intitled to have the Price for which the damaged Sugars were ſold, *made up* 30*l. per* Hogſhead: And it ſeems to us as plain as any Propoſition in *Euclid*, That the Rule by which the Jury have gone is the *right* Meaſure.

The RULE muſt be DISCHARGED.

Rex *verſ.* Bell.

THIS was a Conviction for importing *Iriſh Butter* from *Liſbon* into *England*, contrary to the Acts of 18 *Car.* 2. *c.* 2. 20 *C.* 2. *c.* 7. and 32 *C.* 2. *c.* 2: Which Conviction was to the Effect following—

Town and County of the Town of *Kingſton upon Hull*— Be it remembered that on the 2d of *Auguſt*, 34 *G.* 2. at the ſaid Town and County, *Edward Burrough* Eſq; Collector of His

* His Majeſty's Subſidies and Cuſtoms within the Port of *P. 1174.
the ſaid Town and County, and *an Inhabitant* thereof, cometh in his own proper Perſon before *John Wood* and *William Cogan* Eſquires, two Juſtices of our ſaid Lord the King aſſigned to keep the Peace of our ſaid Lord the King within the ſaid Town and County; and, ſuing as well for the Poor of the Pariſh of *St. Trinity* in the ſaid Town and County as for Himſelf in this Behalf, giveth the ſaid Juſtices to be informed and to underſtand, That certain *Butter*, to wit, 547 Barrels thereof, containing All together in weight 301 Hundred-Weight, was on the 8th Day of *July* laſt paſt *imported into this Kingdom*, to wit at the Port of the ſaid Town and County, the ſame Butter and Every Part thereof having been exported *from out of the Kingdom of Ireland* TO LISBON in the Kingdom of *Portugal*, and having been FROM THENCE *imported* into *this* Kingdom, to wit at the Port aforeſaid *in* FRAUD *of the Revenue* of our ſaid Lord the King, and contrary to the Form of the Statutes in that Caſe made and provided; And that the ſaid Butter had been duly and legally SEIZED, at and in the ſaid Town on the 28th Day of *July* aforeſaid, between the Hours of Ten and Twelve in the Forenoon, and duly and legally preſerved and kept from that Time to the Time of exhibiting this Information; And that the *Owner or Owners of the ſaid Butter* or any Part thereof, or any Perſon for or on the Behalf of him them or any of them, *had not made it appear* unto any Juſtice of the Peace of and for the ſaid Town and County, by the Oath of two credible Witneſſes or otherwiſe howſoever "That the ſaid Butter was *not* imported, in Manner "and Form aforeſaid, *from* the ſaid Kingdom of IRELAND "into this Kingdom." Whereupon the ſaid Juſtices did, on the ſaid 2d Day of *Auguſt*, duly and legally order *Mr. Richard Bell* of the ſaid Town and County Merchant, the *Conſignee and apparent Owner* of the ſaid Butter and every Part thereof, to be ſummoned to appear before them at the Houſe of *Archibald Brown*, at the Sign of the *Dog and Duck* in the ſaid Town and County, on the 5th Day of the ſaid Month of *Auguſt*, then and there to anſwer the ſaid Information and Premiſſes. At which Time and Place, come before them the ſame Juſtices, as well the ſaid *Edward Burrow* as the ſaid *Richard Bell*: And the ſaid *Richard Bell* having heard the ſaid Information read to Him, and being aſked by the ſaid Juſtices, "Why the ſaid *Butter* ſhould not be *forfeited*," ſaith, "That he hath *Nothing to object* againſt the *Truth* of "the ſaid Premiſſes contained in the ſaid Information." Whereupon, and upon the Examination of a credible Witneſs in that Behalf, in the Preſence of the ſaid *Richard Bell*, and becauſe the ſaid *Richard Bell* hath Nothing to ſay nor can ſay any Thing touching the ſaid Premiſſes, but doth acknowledge the ſame to be true as the ſame are charged in the ſaid Information; It appears

* P. 1175. *pears unto them the ſaid Juſtices, That the ſaid Information and every Part thereof is true: And they the ſaid Juſtices do adjudge the ſame to be true accordingly. It is therefore conſidered and adjudged by them the ſaid Juſtices, That the ſaid Butter and every Part thereof IS FORFEITED; And that One Moiety or Half Part thereof be diſpoſed to the Uſe of the Poor of the ſaid Pariſh of *St. Trinity* in the ſaid Town and County, and the other Moiety or Half Part thereof be to the proper Uſe of the ſaid *Edward Burrow*. Given under our Hands and Seals, at the Town and County of the Town of *Kingſton upon Hull*, the 5th Day of *Auguſt* in the 34th Year of &c, and in the Year of our Lord 1760.

Mr. *Morton*, for the Defendant, inſiſted That this Conviction ought to be quaſhed. (See 18 *C.* 2. *c.* 2. 32 *C.* 2. *c.* 2. § 9. and 31 *G.* 2. *c.* 28.)

The Butter was exported from *Ireland* to *Liſbon*; and from *Liſbon re-exported to England*, and imported here at *Hull*: Which (He inſiſted) did not occaſion a *Forfeiture* of the Butter. Therefore this Conviction is wrong, in making it abſolutely *forfeited*; even though it ſhould be liable to the greater Duty, and not to the leſs.

Beſides, the *Diſtribution of the Penalty* is not agreeable to the Act of Parliament.

Mr. *Norton*, *contra*, in Support of the Conviction.

Iriſh Butter, *imported from Liſbon* or any other Place, is *confiſcateable*, by 18 *C.* 2. *c.* 2. 32 *C.* 2. *c.* 2. § 9. and 20 *C.* 2. *c.* 7. § 3.

All theſe Acts are to be conſidered as one Law: And by them, All *Iriſh* Butter, imported hither from *any* Place whatſoever, is forfeitable, juſt as much as if it was imported directly and immediately from *Ireland*. The Acts of Parliament would be nugatory, if they might be evaded by touching at the *Iſle of Man*, or any other Place.

The Conviction is founded on theſe three Statutes of *C.* 2. And this Importation from *Liſbon* is not protected by the Act of 31 *G.* 2. *c.* 28, Which allows the Importation of Butter *from Ireland* into *England* during 6 Months, paying 4*d. per* hundred Weight; Becauſe the Butter permitted by that Act to be imported muſt be imported *immediately* from *Ireland*.

He compared this Law to ſome others, where the Importation muſt be *directly* from the Place:---12 *G.* 2. *c.* 21. (An Act for taking off the Duties upon Woollen and Bay Yarn imported from *Ireland* to *England*;) 23 *G.* 2. *c.*

* 2. *c.* 29. (An Act to encourage the Importation of Pig* P. 1176. and Bar Iron from his Majeſty's Colonies in *America*;) And 32 *G.* 2. *c.* 11, 12.

However, This Conviction was unneceſſary, and only *ex majoricautela*: For the Goods were *actually and ipſo facto forfeited*, by not being claimed and proved, &c, within 48 Hours.

Mr. *Morton* was going to reply—

But Lord MANSFIELD ſaid it was needleſs.—Here is no Suſpicion of Fraud. If there had, it might be a different Caſe. It would not be worth while to go round by *Liſbon*, to evade the Act; and to pay 7*s.* 8d. to avoid paying 4*d.* And if it be within the Prohibition, it is within the Permiſſion.

His Lordſhip however propoſed to the Parties, That the Officer of the Cuſtoms (Mr. *Edward Burrow*, Collector at *Hull*) ſhould pay the Proprietor, (the Conſignee,) the value of the Butter at the Time of the Seizure, together with the Coſts.

And, in Order to compromiſe the Matter, and ſave the bringing an Action, He ordered it to ſtand over from *Saturday* laſt to this Day.

A Third Perſon having now named 26*s.* *per* Barrel as the Price that Mr. *Burrow* ought to refund to the Conſignee of it; And Mr. *Norton* thinking that too much; the Compromiſe came to Nothing: For Mr. *Norton* thought it better for his Client, to ſtand an Action, and ſuffer Judgment to go by Default, and leave the Matter to the Jury, upon a Writ of Inquiry of the Damage ſuſtained by the Seizure.

Whereupon *Per Cur.*

THE CONVICTION WAS QUASHED.

The End of *Eaſter* Term 1761, 1 *G.* 3.

Trinity

* Trinity Term,

1 Geo. 3. B. R. 1761.

Mr. Juſtice *Foſter* was abſent till *Thurſday* 28th *May*, (the 7th Day of the Term.)

Tueſday 26th *May* 1761.

Denn, ex dimiſſ. Lucas, *verſ.* Fulford.

THIS was a Special Caſe, upon an Ejectment of Lands in *Medley* in *Oxfordſhire*.

(*N. B.* In *Hilary* Term laſt, this Court had ſtayed the Proceedings, till the Leſſor of the Plaintiff, who lived in *Ireland*, ſhould give *Security for the Coſts*; although it was an Ejectment brought under the Direction of the Court of Chancery, where the Bill was retained till after Trial of the Ejectment; and Security had already been given there; But *that* Security was only for 40*l.*)

At the Trial, the Plaintiff offered in *Evidence*, (for the Purpoſe only of reading ſeveral Depoſitions taken in a Cauſe in Chancery,) a Paper-Writing purporting to be a true COPY *of a Bill in Chancery* brought by the Plaintiff's Leſſor, againſt *Theophilus Leigh* and Others; (And it was proved to have been examined with the Record:) Which *Copy* ſo offered in Evidence was *written* CLOSE, on TWO *Sheets* of Paper containing *Forty* OFFICE-*Copy* Sheets in Quantity; and *Each of the* TWO Sheets of Paper was STAMPED with a *triple* SIX-*penny* Stamp *only*.

And He further offered in *Evidence* Another Paper-Writing purporting to be a true *Copy* of an *amended Bill* brought by the Plaintiff's Leſſor againſt the ſaid Defendants and Others, (proved likewiſe to have been examined with the Record;) *written alſo* CLOSE, on THREE *Sheets* of Paper containing *Forty four* OFFICE-*Copy* Sheets in Quantity; And *Each of the* THREE *Sheets* ſtamped with a *triple* SIX-*penny* Stamp *only*.

It

It * was objected "That *ſuch Copies*, or either of them, "ought not to be *read*; becauſe *not* PROPERLY *ſtamped*, "according to the Statutes." But a Verdict was given for the Plaintiff, ſubject to the Opinion of the Court, "Whether ſuch *Copies* are PROPERLY *ſtamped*, ſo as "to intitle the Plaintiff to have them read in Evidence." If they are, then the Plaintiff to enter his Judgment: If not, then the Verdict to be void. * P. 1178.

It was firſt argued on *Tueſday* 28th of *April* 1761.

Mr *Stowe*, for the Plaintiff—This Queſtion depends upon the ſeveral Stamp-Acts. The 5, 6 *W. & M. c.* 21. (now made perpetual) lays * a Duty of One Penny upon every Skin or Piece of Vellum or Parchment or Sheet of Paper upon which *any* † *Copy* of any Proceedings whatſoever in any Court of Equity ſhall be ingroſſed or written.

*V Sect. 44.

† See alſo 32 *G.* 2 *c.* 35 § 10. which lays a like Duty; but ſeems confined to Courts of *Law* only.

The 9, 10 *W.* 3. *c.* 25. § 64. enacts (to the End the King may not be defrauded) "That all Records, Writs, "Pleadings, *or other Proceedings* in Courts of Law and "Equity, and all Deeds, Inſtruments and Writings whatſo-"ever, thereby charged, ſhall be ingroſſed or written in "*ſuch manner* as they have been uſually accuſtomed to be "written and are now written." And this is the principal Statute on which this Queſtion turns.

The word "COPY" is not in this 64th Section. The preſent Caſe is of an *examined* Copy, not an Office-Copy. The Rule of *Office* Copies is different in different Courts; *viz.* In Chancery, 90 Words in a Sheet; In the Exchequer, 78; In this Court, 72: But *cloſe* Copies were only ſtampt with one double Penny Stamp; now indeed a triple Penny.

And Copies of Deeds are generally produced and proved without any Stamp at all: Whereas this was ſtampt with a Stamp of ſix Times the Value.

The only Intent of theſe Stamp-Acts is to raiſe the Duty to the Crown: And this Stamp does that and much more

Mr. *Aſton contra*, for the Defendant, agreed that the Queſtion depends entirely upon the Stamp-Acts.

The 5 & 6 *W. & M. c.* 21. laid the Penny Duty.

The 9, 10 *W.* 3. *c.* 25. §. 40. lays one Penny upon every Sheet of Paper upon which any Copy of any Bill in Equity ſhall be ingroſſed or written. This was an *additional* Penny.

* P. 1179. * Section 49 directs *every ſuch Sheet* to be ſtamped before the Writing; and with two diſtinct Stamps.

Section 59 directs, that no ſuch Inſtrument or Writing not ſo ſtampt, &c. ſhall be *given in Evidence*, till as well the former Duty as the latter ſhall be paid. So that theſe two Stamps were to be ſeparate and diſtinct.

The 30 *G.* 2. *c.* 19. § 18. makes it lawful to ſtamp with *One* general new Stamp, equivalent to all the other ſeparate old Ones.

The 32 *G.* 2. *c.* 35. has no ſuch Clauſe as that of §. 64. in 9, 10 *W.* 3. *c* 25. But its 13th Section (*Fo.* 515) directs all Paper, &c. thereby charged to be brought to the Stamp-office, and ſtampt, &c.; and enacts that it ſhall not be available in Law or Equity, or be given in Evidence or admitted in any Court, unleſs ſo ſtampt.

Therefore *Every* Copy of any Bill in Chancery muſt be ſtampt with either the old or the new Stamp. And this is not ſo ſtampt. Neither is it ſtampt *ad valorem*; but, on the contrary, 13*s.* 6*d.* ſhort, if it be computed by the Sheet, at 90 Words *per* Sheet: A Sheet is a known Quantity containing ſo many Lines, and ſo many Words in each Line.

Lord MANSFIELD—But how does it appear that it is *neceſſary* that a Copy of a Proceeding in Chancery, given *in Evidence*, muſt be an OFFICE-Copy? I ſhould be glad to hear this Point argued. For if that be *not* neceſſary, the Duty is paid: If it *be* neceſſary, then it is *not* paid.

Mr. *Aſton*—The *Practice* is ſo. And the Acts of Parliament ſay "*Every* Copy of any Bill."

LORD MANSFIELD—An OFFICE-Copy is, in the ſame Court and in the ſame Cauſe, *equivalent to the Record*: But in *another Court* or in *another Cauſe* in the ſame Court, the Copy muſt be PROVED.

Before the firſt Act which gave the ſingle Penny Duty, a Copy of a Proceeding in one Court might be given *in Evidence* in another, written as *cloſe* as the Writer pleaſed. And the ‡ Clauſe which is profeſſedly intended to prevent Colluſion as to the *Proceedings* of the Court does not ſay a Word about *Copies*. Each Party in a Cauſe in Chancery muſt take an *Office* Copy of the *adverſe* Pleadings: But he may read the *Draught* of his own. Reading the *Office*-Copy is equivalent to reading the Record itſelf.

‡ Sect. 61. of 9, 10 *W.* 3. *c.* 25.

It

* It is not to be conceived that the Legiſlature intended to put the Parties to the Expence of 40*l.* or 50*l.* in taking out *Office* Copies; only for the ſake of raiſing 18*d.* or (upon the firſt Act) only a Penny to the Crown. * P. 1180.

Mr. *Aſton* obſerved that ſuch a Conſtruction would greatly leſſen the Revenue. At this Rate, *One* Three Penny Stamp would do for a whole Bill.

Mr. Juſt. WILMOT—So You would have FORTY 3*d.* Stamps for this *One* Copy of the Original Bill.

Mr. *Aſton*—Yes: This is what I inſiſt on.

Lord MANSFIELD—The Act of Parliament did not mean to alter the Rule, as to the giving Copies *in Evidence*: If it had, it would have been a heavy Charge upon the Suitor. The *Practice* of a Party's giving the Office Copies in Evidence, very often is to be accounted for, by their having thoſe Office-Copies in their Poſſeſſion already: So that it is, in ſuch Caſe, even cheaper to them to uſe theſe than any others.

Mr. *Norton*, who was retained for the Defendant, urged the Loſs that the Stamp Duty would ſuffer, if this Queſtion ſhould be determined againſt them.

It was therefore Ordered to be ſet down for further Argument on the firſt Day of this Term; with a particular Clauſe in the Rule (by Conſent) to prevent the Plaintiff's being delayed in bringing a new Ejectment, in Caſe the Court's Opinion ſhould be againſt him.

Which Day being now come, and the Cauſe called,

Mr. *Norton* ſaid He ſhould have hoped to have been able to ſupport the Objection, if it had come out, upon Inquiry, that the *Uſage* of the Stamp-Office had been uniform and conſiſtent, ever ſince the making of the Act, in requiring cloſe Copies to be ſtampt in this Manner.

But He acknowledged, that upon Examination into the Facts, it appeared that there had been no ſuch uniform Uſage; but, on the contrary, different Uſages, and even different Opinions amongſt the Commiſſioners themſelves. Therefore unleſs the Court would couple ſome of the Sections with each Other, He was afraid He could not pretend to ſupport the Objection.

* P. 1181. *Lord MANSFIELD—Certainly, the Act of Parliament took up the Matter on the Foot upon which it *then* ſtood And at the Time of making theſe Acts, there were *two Sorts* of Copies of Proceedings: One Sort was a *cloſe* Copy, which might be given in Evidence, in another Court; The other Sort was an *Office*-Copy; and this was equivalent to the Record itſelf, when made uſe of in the *ſame Court* and in the *ſame Cauſe*. This *Office*-Copy was then fixed at a certain determinate Number of Words in a Sheet, in order to aſcertain the Fees of the Officers of the reſpective Courts: But Copies to be given in Evidence might, at that Time, be written as cloſe as the Writer pleaſed. Thus the Stamp-Act found it. And they did not mean to *alter* the Manner of making Copies to be given in Evidence, or to fix *them* to ſo many Words in a Sheet: They only meant to prevent any Fraud upon the Stamp-Duties with regard to the OFFICE-*Copies*, by the Parties compounding with the Officers for their Fees, and then writing more than the uſual Number of Words in a Sheet of *them*.

Per Cur. Let the POSTEA be delivered to the PLAINTIFF.

Fenn, ex dimiſſ. Tyrrell et al.' *verſ.* Denn.

MR. *Gould*, of Counſel for the Leſſor of the Plaintiff in this Ejectment, had obtained a Rule upon Mrs. *Magdalen Campbell*, the Tenant in Poſſeſſion of the Premiſſes in queſtion, for Her to ſhew Cauſe * Why the *Service* of the Ejectment in this Cauſe, which † *had been* theretofore made upon a woman who had *ſaid her Name was Magdalen Campbell*, at the Time when it was ſerved upon Her at the ſaid *Magdalen Campbell*'s Houſe, ſhould not be deemed *good Service* upon the ſaid *Magdalen Campbell* Herſelf; and why the Leſſors of the Plaintiff ſhould not have Leave to ſign their Judgment againſt the Caſual Ejector, on *Wedneſday* next, in Default of her Appearance: In which Rule it is further Ordered, that the Leaving a Copy of this Rule at the Houſe of the ſaid *Magdalen Campbell*, with ſome Perſon there; or if no One can be met with, *Affixing* a true Copy of it on the Door thereof; ſhall be deemed *good Service* thereof on the ſaid *Magdalen Campbell*.

* A like Rule "to ſhew Cauſe why a † *preceding* Service of an Ejectment upon a *Servant* in the Houſe of one *Hawkins*, Tenant in Poſſeſſion, ſhould not be deemed a good Service of it," was made on the 2d Day of this Term, appearing that perſonally in a Cauſe of *Goodright, on the Demiſe of Methold*, v. *Noright*; on its appearing that *Hawkins* and his Wife both kept out of the Way, to prevent their being ſerved.

† *N. B.* If the Rule were not thus made with a *Retroſpect*, the Plaintiff muſt loſe the Aſſizes.

The ſaid Rule was now made abſolute, upon producing an Affidavit "That *Magdalen Campbell* was ei-"ther not at Home, or (if at Home) was deni-"ed; and that her Servant-Maid was at Home, but "could

" * could not be ſerved; whereupon a Copy of the Rule was * P. 1182.
" fixed on the Door of the Houſe;" And moreover, " that
" at a ſubſequent Day," (upon a Doubt whether what had been already done was ſufficient,) " the Maid being at
" Home and opening the Window, but refuſing to open
" the Door, and denying that her Miſtreſs was at Home,
" *Another Copy was affixed* on the Door, and the Maid was
" told the Effect of it; and *another Copy was thrown in* at the
" Window; and the Original Rule was *ſhewn* to the Maid."

Per Cur. RULE made ABSOLUTE.

Rex *verſ.* Darbyſhire.

Wedneſday 27th May 1761.

THIS was a Caſe from *Warwickſhire* Aſſizes.

The Defendant was originally indicted at the Quarter-Seſſions holden at *Warwick*, on the 4th of *April*, 1758, for refuſing to take upon Himſelf the Office of Conſtable of and for the MANOR *of Birmingham*, having been duly nominated and elected thereto. The Indictment ſet forth, That at a Court Leet holden on the 18th of *October* 31 *G.* 2. in and for the MANOR of *Birmingham*, The Defendant, according to the Cuſtom of the ſame Manor, was duly nominated and elected by the Jury, One of the Conſtables of the ſaid MANOR of *Birmingham* for the Year then next enſuing; He then being an Inhabitant and Reſiant of and within the ſaid Manor, and being a fit Perſon ſo to be nominated and elected, and a Perſon liable to be nominated and elected to the ſaid Office. That the Defendant had Notice, *&c.* That the Steward certified his Appointment to a Juſtice of Peace; by whom He was ſummoned to appear on *&c* at *&c*, to take the Oath of Office as Conſtable nominated and elected of and for the ſaid *Manor* of *Birmingham* as aforeſaid. That although He perſonally appeared according to the Summons, and was then and there required by the ſaid Juſtice to take the ſaid Oath of Office of Conſtable of and for the ſaid *Manor* of *Birmingham* according to the Nomination and Election aforeſaid, He unlawfully wilfully and contumaciouſly did neglect and refuſe to take it, and to be duly ſworn into the ſaid Office, and to take it upon him. There was a ſecond Count in the Indictment, alledging that He was perſonally preſent in Court at the Leet; and being required by the Steward to be ſworn and take the Office upon him, neglected and refuſed *&c.*

This Indictment being removed hither by *Certiorari*, the Defendant pleaded " Not guilty." And the Cauſe was tried at *Warwick* Summer-Aſſiſes in *Auguſt* 1759, before Ld. Ch. B. *Parker*.

It

*P. 1183. * It appeared upon the Evidence, That the Facts laid in the Indictment were true; And that the Defendant was a fit Perſon to be nominated and elected as aforeſaid; and liable to ſerve the ſaid Office of Conſtable, UNLESS diſcharged or *exempt* therefrom by reaſon of the *Certificate* and Aſſignment thereof herein after mentioned: Alſo, that the Uſage at *Birmingham* has been, "annually at the Court "Leet there, to elect two Conſtables for the MANOR of "*Birmingham generally*, and one Conſtable for the Hamlet "of *Deritend* (a diſtinct Vill within the ſaid Manor) par-"ticularly."

That the MANOR of *Birmingham* extends itſelf into and *comprehends the whole Town and Pariſh* of *Birmingham*, and *alſo* the ſaid Hamlet of *Deritend*.

That the Conſtables ſo elected for the ſaid *Manor* of *Birmingham generally*, have Juriſdiction and Authority, as Conſtables, *not only* throughout the ſaid *Town and Pariſh* of *Birmingham*, but ALSO *within and throughout the ſaid Hamlet of* Deritend.

That the Conſtable of *Deritend* is elected out of the Inhabitants of *Deritend* only: And the Conſtable ſo elected for *Deritend* particularly, and the ſaid Conſtables ſo elected for the ſaid *Manor* of *Birmingham* have ſeverally *equal* and *concurrent* Juriſdiction within the ſaid Hamlet of *Deritend*.

That the Defendant had a CERTIFICATE according to the Statute of 10, 11 *W.* 3. *c.* 23. diſcharging One *Plowden Jennett* from all Pariſh Offices within the Pariſh of *Birmingham*; and the Aſſignments thereof, ſigned and executed on the ſeveral and reſpective Days of the Dates thereof reſpectively: And the ſame was duly inrolled according to the ſtatute; and had not been before aſſigned.

Upon this Caſe, The Queſtion reſerved for the Opinion of His Majeſty's Court of King's Bench, is

"Whether the ſaid *John Darbyſhire*, upon the Circum-"ſtances of this Caſe, is, *notwithſtanding the Certificate*, "guilty of the Indictment, or not guilty."

Mr. Serj. *Hewitt*, for the King, argued, that He is *not* exempted from ſerving *this* Office herein deſcribed.

The Diſcharge is (by the Act) from all "PARISH *and* "WARD *Offices*," within the Pariſh or Ward wherein the Felony was committed. But the Limits of *this* Man's Office

* Office extend BEYOND *the Pariſh of Birmingham:* Therefore this is not a PARISH Office. And there is no ſuch Diviſion in this Place, as a *Ward:* Therefore no WARD Officer. * P. 1184.

But a CONSTABLE is *not a Pariſh*-Officer at all. It was a Common-Law Office, before Pariſhes exiſted. Conſtables were, by Common-Law, Conſervators of the Peace. "The Office is as ancient as Turns or Leets;" 4 *Inſt.* 265. Therefore *more* ancient than *Pariſhes.*

A Pariſh is not a *Common-Law Diviſion*; but an *Eccleſiaſtical* One: And ſo it was aſſerted, in *Freeman's Rep.* 228. in the Caſe of *Adeſon* v. *Sir John Otway*, by Mr. Juſtice *Atkins.* And in *Mich.* 10 *W.* 3. An Appointment of a Conſtable was * quaſhed, becauſe it was not alledged in the Order, "That he was an Inhabitant of the *Liberty*," but only "of the *Pariſh.*" *Caſes temp. W.* 3. 256. *Anonymous.* * *Abſente Holt.*

Here, this Man is appointed Conſtable in and for the MANOR of *Birmingham.*

The Office of Conſtable is always annexed to a *Vill*, *not* to a *Pariſh.* But the *Felony*, in this Caſe, was committed in the *Pariſh of Birmingham*, not in the Vill of *Deritend.*

Mr. *Caldecott*, for the Defendant.— He is *at leaſt* a PARISH-*Officer*, (whatever more He may be;) becauſe his Office *extends throughout* the *whole* Pariſh of *Birmingham:* And he is an Inhabitant of the Pariſh of *Birmingham.* Therefore, though He be *alſo* Conſtable of the MANOR which *includes the Pariſh*; yet He is certainly a *Pariſh* Officer, notwithſtanding that greater Extent of his Juriſdiction or Power.

This Act is to be conſtrued *favourably.* And it has been determined on † 3, 4 *W. & M. c.* 11. "That ſerving the "Office of Conſtable for a City at large, (though he was "appointed by the Corporation, and exerciſed it through-"out the whole City,) gained a Settlement in the Pariſh "where he inhabited." 2 *Strange*, 1014. *Between the Pariſhes of St. Maurice* and *St. Mary Calendar in Wincheſter.* † It was on 9, 10 *W.* 3. *c.* 11. (See Serjeant *Hewitt's* Reply.)

He cited *P.* 29 *G.* 2. *B. R. Rex* v. *Davies, Collector of the Rates and Duties of the Highways of the Pariſh of St. Leonard Shoreditch*, Who was appointed by the Truſtees under the Act of Parliament, and *not choſen by the Pariſh:* Yet it was holden to be a *Pariſh-Office*; and "That this Act ought "to receive the *moſt* liberal Conſtruction."

In

P. 1185. * In the Liberty of *Weſtminſter*, the Conſtables are choſen by the Burgeſſes for the Liberty of *Weſtminſter*, and act throughout the whole Liberty: Yet they always *enjoy the Benefit* of theſe Certificates.

This Caſe is executing an Office *in* the Pariſh where the Man lives; and is certainly within the Intention of the Legiſlature: For the Act of Parliament directs the Judge to certify in what Pariſh or Place the Felony was committed.

Mr. Serj. *Hewitt*, in Reply—The Reward is only a Diſcharge from *Pariſh* and *Ward* Offices; and from no Others.

As to 2 *Strange* 1014.—It depends upon the Words of the Act of Parliament of 9, 10 *W.* 3 *c.* 11. Which only requires executing a *public annual* Office, *within the Pariſh*: It does not at all ſpeak of PARISH *Offices*; nor is confined to them, as *this* is.

As to the Caſe of *Rex* v. *Davis*—The Man was choſen, by Truſtees under an Act of Parliament for repairing the *Highways of that Pariſh*, Collector of ſuch Highway Rate within the Pariſh: So that that *was* ſtrictly and properly a *Pariſh* Office.

In *Weſtminſter*, I believe the Conſtables are appointed for a particular Pariſh, *not* for the Liberty in general.

The preſent Caſe, moſt manifeſtly is *not confined* to the Pariſh where the Felony was committed: Which, by the Act, it ought to be; For it is clear that the Act does not mean to extend it further than *that* Limit.

Lord MANSFIELD—The only Queſtion upon this Caſe is, "Whether the Conſtable of the *Manor of Birmingham* "is a PARISH *Officer* of the Pariſh of *Birmingham*."

This Term "*Pariſh-Officer*" does not include *every* Office exerciſed *in* the Pariſh: If it did, it might even take in the Office of High-Sheriff of the County.

A *Pariſh* Officer is *relative to the Pariſh*, and confined to the Pariſh only. A Conſtable of a *Pariſh* may be called a Pariſh Officer: But this Man has a *much larger* Juriſdiction than the Pariſh *only*: For He has a Juriſdiction over the whole Manor, which extends much *beyond* the Pariſh; And the Pariſh is only a PART of that Diſtrict over which it is to be exerciſed. And the Act does not intend the Certificate to be a Diſcharge from an Office, where-

of

* of the Functions are to be exerciſed *out of the Limits of the Pariſh*. * P. 1186.

This Man cannot be eſteemed a *Pariſh*-Officer, either from the *Origin* of his Office, or the *Nature*, or the *Exerciſe* of it.

Mr. Juſt. DENISON—*If* it had been ſtated, "That "the Manor of *Birmingham* and the Pariſh of *Birmingham* "were *co-extenſive*," this Certificate might have been a ſufficient Diſcharge. But this is ſtated quite otherwiſe, namely, "That the Juriſdiction of the Conſtables elected "for the Manor generally, extends *not only* throughout the "Town and Pariſh, but ALSO *within and throughout the* "*Hamlet of Deritend*."

The Act only meant to excuſe the Proprietor of the Certificate, from ſerving Pariſh and Ward Offices *within* the Pariſh or Ward where the Felony was committed; and not from Offices to be exerciſed *out* of the Pariſh or Ward. If ſo, this is *not* an Office within the Words or Meaning of the Act of Parliament, upon this State of the Caſe now before Us: For this is not an Office of Conſtable in and for the *Pariſh*; but in and for the MANOR, which is *more extenſive* than the Pariſh is; and a different Species of Diviſion too, One being Eccleſiaſtical, the other Civil.

Mr. Juſt. WILMOT—The Act of Parliament means theſe Certificates to be Exemptions from ſuch Offices only, the Functions of which are *confined within* that Sort of Diviſion which is now called a *Pariſh*, which is not a Civil, but an * Eccleſiaſtical Diviſion. No ſuch Species of Diviſion was known at * Common Law: The Temporal or Civil Diviſion was into *Vills*, not into Pariſhes.

* *V. Freeman's Reports* 228. *per Atkins, accord*.

And this Office now under our Conſideration, as the Caſe is ſtated, could be only a *partial* Exercife of the Functions of this Office, *within the Pariſh of Birmingham*: For He could only exerciſe within the Pariſh of *Birmingham*, the Functions of *ſuch Part* of the Juriſdiction as the *Limits of the Pariſh extended to*; but *not* thoſe of the *Reſt* of his Juriſdiction which lay *beyond* the Limits of it. Conſequently, the Exemption He could pretend to claim under this Certificate could be, as this Caſe is ſtated, *only partial*: But it would be *abſurd* to conſtrue the Act to *exempt* him from ſerving the ſame identical Office within the *Pariſh*, and yet leave him *liable* to ſerve it in the *Vill*.

Mr. *Caldecott*'s Caſe cited from 2 *Strange* is very ſtrong for the preſent Opinion of the Court. That Caſe was upon the Certificate-Act of 9, 10 *W.* 3. *c.* 11. The Queſtion was, "Whether executing the Office of Conſtable for the City

"at

*P. 1187. " * at large gave a Certificate-man a Settlement in the " Parish wherein he inhabited *and exercised it:*" And it was holden, " That He did acquire a Settlement thereby." But it was *not* treated as a *Parochial* Office: It was enough, that it was an *annual* Office *exercised within* the Parish; which was sufficient to bring it within *that* Act of Parliament, though it was not a *Parochial* Office.

And as to the Case of *Davis* the Collector of the High-way-Rates of *St. Leonard's*—It turned singly upon an Act of Parliament, peculiar to that Parish.

That of *St. Maurice* in *Winchester* was indeed about an Office in the *City in general*; And this is an Office in the *Manor in general*: But the Question did not there turn upon its being a *Parochial* Office, or not; it being sufficient that it was an *Annual* One.

Per. Cur. unanimously,
Let the POSTEA be delivered to the Prosecutor;
And let JUDGMENT be entered for the KING.

Campbell, Esq; *vers.* Cumming and Another.

A *Scire facias* being brought against Bail, The Defendants pleaded thereto, " That the Principal died " before the Return of the *Capias ad satisfaciendum.*" The Return of the *Ca. sa.* being thereupon set forth in the Replication, it appeared to be returnable " on *Thursday* next " after Eight Days *from* the Day of the Purification of the " Virgin *Mary.*" The Defendant demurred, generally, to the Replication.

Mr. Serj. *Nares*, on Behalf of the Defendant, insisted that the Proceedings were irregular: For the Word "*from*" is exclusive; and consequently the Writ is not returnable till in *Vacation*-Time, (even a Week in the Vacation.)

And as this was a Proceeding by Bill, the *Scire facias* must *bear Teste* on the Day of the Return of the *Ca. Sa.*: Which therefore will be in *Vacation-Time* too.

It ought, He said, to have been made returnable " on " *Thursday next after the Octave, &c.*" And He cited a Case of *Girdler* v. *White*, *M.* 3 *G.* 2. *B. R.*

Mr.

* Mr. *Yates*, *contra* for the Plaintiff, inſiſted that it was *right and regular*, in true and even ‡*ſtrict* Computation: And, were it otherwiſe, Yet as it was an *Execution* and not upon meſne Proceſs, the Writ of *Ca. ſa.* would *not be void*, but only liable to be ſet aſide upon *Motion*, for Irregularity. And he cited the Caſe of *Shirley* v. *Wright*, 1 *Salk.* 273 Where it was holden "That the Sheriff who had let his "Priſoner eſcape, ſhould not take advantage of a Want "of a *Scire facias* to ground the *Ca. Sa.* upon, which had "iſſued *poſt diem et annum*."

* P. 1188.

‡ It was ſo. For the Purification fell on *Monday*: So that, either Way, the *Thurſday* next after 8 Days from it, or the *Thurſday* next after the Octave of it, was the 12th of *February*.

The Whole Court were very clearly and unanimouſly with Mr. *Yates* in *both* Points; and accordingly gave

Judgment for the Plaintiff.

Sarah Nickleſon *verſ.* Stephen Croſt.

THIS was a Queſtion (upon the Maſter's Report,) "Whether there were, or were not, *more Counts* "inſerted in the Declaration, than were neceſſary."

It was a *Declaration upon a Policy of Inſurance*, conſiſting of *Seven* Counts; 1ſt. for a *total* Loſs, on a Policy *ſubſcribed by the Defendant Himſelf*; 2d for an *Average* Loſs, (averred to amount to 63*l.* 4*s.* 6*d.*) on a Policy *ſubſcribed by the Defendant Himſelf*; 3d. for 6*l. per Cent.* to be returned, (it being averred "That the Ship departed with Convoy,") on a Policy *ſubſcribed by the Defendant Himſelf*; 4th, 5th and 6th, exactly the ſame with 1ſt, 2d and 3d (reſpectively,) with *this Difference only*, that theſe three laſt Counts alledged the Policy to have been *ſubſcribed* by One *Manoel Francis Silva*, *the Defendant then Agent Factor or Servant* in that Behalf by Him duly authoriſed appointed and deputed for that Purpoſe; 7th, for Money had and received to the Plaintiff's Uſe. The Maſter (Mr. *Owen*) thought that *Four* Counts were ſufficient; *viz.* either the Three firſt with the laſt; or elſe the 4th, 5th and 6th, together with the laſt.

The Court agreed with Him in Opinion.

Lord Mansfield— On a Declaration for a *total* Loſs, You may *recover an Average Loſs*: Yet I *would not tie the Plaintiff down* to declare *only* for a total Loſs; but leave the Plaintiff at Liberty to declare *both* Ways. And the latter Method is often of Service to a Defendant, by pointing out the particular Average that the Plaintiff goes for.

But

* P. 1189. * But it is *unneceſſary* to declare *double*, with Reſpect to the *Signing* of the Policy; that is to ſay, *Once* as upon a Policy ſigned by the *Defendant himſelf*; and *again*, as upon a Policy ſigned by his *Agent for Him*. *One alone* of theſe two Methods of declaring is ſufficient: And the *better* Way is to declare according to the *Truth*; that is, upon a Policy ſigned by *Silva*, as agent for the Defendant duly authoriſed by Him in that Behalf.

THE RULE at laſt ſettled by the Court, was for ſtriking out the three firſt Counts (which alledged the Policy to be ſigned by the Defendant Himſelf:) But without any Payment of Coſts, as this Manner of declaring was ſaid to be uſual.

Saturday 30th May, 1761.

Rex *verſ.* John Morris.

THE Defendant having been convicted of wilful and corrupt *Perjury*, in an *Anſwer in Chancery*, Lord *Mansfield* (who tried him) made his Report on *Tueſday* the 14th of *April:* In doing which, He ſtated an Objection to the Evidence, which had been made by the Defendant's Counſel at the Trial, *viz.* "That there was no Proof of "the IDENTITY *of the Perſon* who ſwore the Anſwer, "nor even Proof that ANY *Perſon at all* ſwore it." This Objection, He ſaid, He had *over-ruled* at the Trial; thinking it ſufficient that the Hand of the Defendant and the Maſter were proved. But He deſired to have the Opinion of His Brethren upon this Point; that the Defendant might have the Benefit of the Objection, if it ſhould ſeem to them to have any Force in it, (though He declared Himſelf to be ſtill clear in his former Opinion.)

† Mr. Juſtice *Foſter* was then abſent (at *Bath*.)

† Mr. Juſt. DENISON and Mr. Juſt. WILMOT entirely concurred with his Lordſhip; And they were All Three clearly and unanimouſly of Opinion, That as the *Name* ſubſcribed to the Anſwer was proved to be *his Hand-Writing*, And Maſter *Bennet* had proved that the *Jurat* was *ſubſcribed by Him* (the Maſter) AS *being ſworn before Him*; This was *ſufficient Proof* "That He was the *ſame Perſon*," and alſo, "That he actually *ſwore* it." For the very Reaſon why the Court of Chancery (ſome Time ſince) made a General Order, "That all Defendants ſhould *ſign* their Anſwers," was with the "very View to the more eaſy Proof of Per-"juries in Anſwers." And as to the *actual Swearing*,—It is, in the Nature and Courſe of Buſineſs, quite neceſſary to take the *Jurat*, *atteſted* by the proper Perſon before whom the Oath ought to be taken, as *ſufficient Proof* of its being *actually ſworn by* the Perſon, ſo far (at leaſt) as to put it upon him to ſhew or to raiſe a reaſonable Suſpicion, "That he "was *perſonated*;" as it would otherwiſe be almoſt impoſſible to convict any one of Perjury committed in an Anſwer in Chancery.

John

* John Enys Eſq; Excutor of Samuel Enys Eſq; *verſ.* Iſaac Donnithorne, Executor of Nicholas Donnithorne. *P. 1190. Friday 5th June, 1761.

THIS was an Action of COVENANT brought by the *Executor* of the Leſſor, againſt the *Executor* of a deceaſed *Joint*-Leſſee.

The Declaration ſets forth an Indenture made on the 10th of *October* 1735, between the ſaid *Samuel Enys* (the Plaintiff's Teſtator) of the one Part, and the ſaid *Nicholas Donnithorne* deceaſed, and *One Joſeph Donnithorne* on the other Part, (the Counterpart of which Indenture, ſealed *&c.* he brings into Court,) whereby the ſaid *Samuel Enys*, for and *in Conſideration* of the Sum of Twenty Guineas paid to him by the ſaid *Nicholas Donnithorne* and *Joſeph D.* or One of them, and *alſo for and in Conſideration* of the yearly Rent and other Reſervations COVENANTS *and Agreements* therein after mentioned and compriſed on the Parts and Behalf of the ſaid *Nicholas D.* and *Joſeph D.* and *Either* of them, their or *Either* of their Executors Adminiſtrators and Aſſigns, to be paid *obſerved and performed*, Did demiſe unto the ſaid *Nicholas Donithorne* and *Joſeph D.* their Executors Adminiſtrators and Aſſigns, All that *&c. then in the Tenure and Occupation of the ſaid Nicholas D. and Joſeph D. or one of them*, their or one of their Agents or Servants; HABENDUM to the ſaid *Nicholas D.* AND *Joſeph D.* their Executors Adminiſtrators and Aſſigns, FROM *the firſt Day of March* LAST PAST, for 50 Years *then next enſuing*, if the ſaid *Samuel Enys* and *Richard Plint* or Either of them ſhould happen ſo long to live, and the then preſent Term and Eſtate of the ſaid *Samuel Enys* therein ſhould ſo long continue; THE SAID TERM TO COMMENCE AND BEGIN *from and immediately after the Surrender Forfeiture or other Determination of the ſaid Leaſe or Demiſe of the ſaid Premiſſes made and granted by him the ſaid Samuel Enys to them the ſaid Nicholas D. and Joſeph D. and bearing Date the* 27th Day of *February* 1728; They the ſaid *N. B. and J. D.* their Executors Adminiſtrators and Aſſigns yielding and paying therefore Yearly and every Year during the ſaid Term hereby granted, AFTER *the Commencement thereof* unto the ſaid *Samuel Enys* his Executors Adminiſtrators and Aſſigns the yearly Rent *&c.* at *&c.*; The *firſt Payment* thereof to be made at or upon *ſuch* of the ſaid Days as ſhould *firſt and next happen* AFTER *the* COMMENCEMENT *of the ſaid Term.* And the ſaid *Nicholas Donnithorne* and *Joſeph D.* did in and by the ſaid Indenture, for themſelves *and Either* of them, their or *Either* of their Executors and Adminiſtrators COVENANT, *promiſe, and agree*, unto and with the ſaid *Samuel Enys* his Executors Adminiſtrators and Aſſigns, That they the ſaid *Nicholas D. and Joſeph Donnithorne or One* of them, their

or

*P. 1191. * *or One* of their Executors Adminiſtrators or Aſſigns ſhould or would from Time to Time and at all Times during the ſaid Term, AFTER *the Commencement thereof*, well and truly pay or cauſe to be paid unto the ſaid *Samuel Enys* his Executors Adminiſtrators or Aſſigns, the abovementioned yearly Rent &c; and alſo ſhould and would from Time to Time and at all Times during the ſaid Term, AFTER *the Commencement thereof*, well and truly yield pay clear and diſcharge all and all Manner of other Charges &c. And the ſaid *Nicholas Donnithorne* and *Joſeph D.* did in and by the ſaid Indenture, for themſelves *and Either* of them, their and *Either* of their Executors and Adminiſtrators jointly *and* SEVERALLY *covenant* promiſe and agree unto and with the ſaid *Samuel Enys* his Executors Adminiſtrators, and Aſſigns That they the ſaid *Nicholas D.* and *Joſeph D. or One of them*, their *or One of their* Executors Adminiſtrators or Aſſigns ſhould and would from Time to Time and at all Times during the ſaid Term, AFTER *the Commencement thereof*, well and ſufficiently repair &c. &c. Then it is averred that the ſaid *Samuel Enys*, at the Time of the making of the ſaid Indenture, was lawfully poſſeſſed of the Reverſion of the ſaid demiſed Premiſſes, expectant on the ſaid Demiſe made and granted by the ſaid *Samuel* to the ſaid *Nicholas D.* and *Joſeph D.* by the ſaid Indenture bearing Date the ſaid 27th Day of *February* 1728, for the Reſidue of a certain Term of 99 Years commencing on the 15th Day of *January* in the Year 1711, then to come and unexpired, and determinable on the ſeveral Deaths of the ſaid *Samuel Enys* and *Richard Plint*, by virtue of a certain Demiſe of the ſaid Premiſſes with the Appurtenances made on the ſaid 15th Day of *January* 1711, by *Hugh* then Lord Viſcount *Falmouth* to the ſaid *Samuel*: And it is further averred, that the ſaid *Richard Plint* is ſtill living, and that the Eſtate and Term ſo demiſed to the ſaid *Samuel* doth ſtill ſubſiſt. The Plaintiff then avers that the Leaſe or Demiſe mentioned in the Indenture now brought into Court to have been made by the ſaid *Samuel Enys* to the ſaid *Nicholas D.* and *Joſeph D.* did end and expire and determine on the firſt Day of *March* 1738. Then the ſaid *John Enys* (the Plaintiff) further ſhews that the ſaid *Nicholas Donnithorne*, being ſo as aforeſaid *poſſeſſed* of and intitled to the Premiſſes by virtue of the ſaid reſpective Demiſes made by the ſaid *Samuel* as aforeſaid, DIED *on the 10th of December* 1737; having firſt duly made his laſt Will and Teſtament, and conſtituted One *James Donnithorne* and the ſaid *Iſaac Donnithorne* (the now Defendant) Executors thereof. That the ſaid *James* and *Iſaac* afterwards duly proved the ſame, and took upon them the Execution thereof. That the ſaid *Joſeph Donnithorne* (the Co-Leſſee) *after the Deceaſe* of the ſaid *Nicholas*, and *after the Expiration* of the ſaid *Leaſe or Demiſe* by the ſaid Indenture bearing Date the *27th of February* 1728, to wit, on the 2d of *March* 1738, *entered* on the ſaid Premiſſes, by virtue of the ſaid Demiſe by the Indenture now brought into Court; and

was

*was thereof *poſſeſſed for the ſaid Term ſo as aforeſaid demiſed by the ſaid Indenture now brought into Court*, in Form aforeſaid, determinable aforeſaid; the *Reverſion* thereof with the Appurtenances for the Reſidue of the aforeſaid Term of 99 Years, belonging to the ſaid *Samuel Enys* and his Aſſigns. That, being ſo poſſeſſed, the ſaid *Samuel Enys* afterwards, to wit on the firſt Day of *November* 1755, made his laſt Will and Teſtament in Writing, and thereby appointed the ſaid *John Enys* (the Plaintiff) Executor thereof; and afterwards, to wit on the ſame Day and Year *died* ſo poſſeſſed of and in his ſaid Reverſion with the Appurtenances in Form aforeſaid: And the ſaid *John Enys* (the Plaintiff) duly proved the ſaid Will of the ſaid *Samuel*, and took upon himſelf the Execution of it, and thereby became and was poſſeſſed of and in the ſaid Reverſion with the Appurtenances, for the Reſt and Reſidue of the ſaid Term of 99 Years, then to come and unexpired, determinable as aforeſaid; and ſtill is thereof poſſeſſed. That the ſaid *James Donnithorne*, after the Death of the ſaid *Nicholas*, to wit on the 1ſt of *December* 1755 *died*; And the ſaid *Iſaac Donnithorne* (the Defendant) thereby became and is the *ſole ſurviving Executor* of the ſaid laſt Will and Teſtament of the ſaid *Nicholas*. Then the Plaintiff *John Enys* ſays that *He* being ſo poſſeſſed of the ſaid Reverſion with the Appurtenances as aforeſaid, afterwards, to wit on 12*th December* 1759, (being 1*ſt December* 1759. O. S.) 240*l.* of the ſaid yearly Rent of 80*l.* for three Years of the ſaid Term of 50 Years elapſed and run out *ſince the Death of the ſaid Samuel Enys*, and ended at and upon that Day in the Year laſt mentioned, at that Day in the Year laſt-mentioned became due owing and in Arrear *to* the ſaid *John Enys* the *Executor* and now Plaintiff, AS EXECUTOR, in Form aforeſaid: And that the ſaid *Nicholas*, and *Joſeph*, in the Life-time of the ſaid *Nicholas*, or the ſaid *Joſeph* ſince the Death of the ſaid *Nicholas*, or the ſaid *James* in his Life-Time, or the ſaid *Iſaac* ſo *being the* EXECUTOR of the laſt Will and Teſtament of the ſaid *Nicholas* as aforeſaid, have not, nor hath Any or Either of them or any other Perſon or Perſons paid the aforeſaid 240*l.* or any Part thereof to the ſaid *John Enys according to the Form and Effect of the aforeſaid Covenant of the ſaid* NICHOLAS *by* Him *made* in Form aforeſaid; But the Payment thereof They and Each and Every of them have hitherto wholly neglected and refuſed, And the ſaid 240*l.* and every Part thereof ſtill remain and are in Arrear due owing and unpaid to the ſaid *John Enys*, contrary to the Form and Effect of the ſaid Indenture and *of the aforeſaid* COVENANT of the ſaid *Nicholas* on this Behalf as aforeſaid. The Declaration then ſets forth that in the ſaid Demiſe of the Premiſſes, made on the 11th of *January* 1711, by *Hugh* Lord *Falmouth* to the ſaid *Samuel*, and under which the ſaid *Samuel* was poſſeſſed and intitled at the Time of the making of the Indenture now brought into Court, there is a Reverſion of the yearly Rent of 5*l.* payable yearly during the

* P. 1192.

*P.1193 * the ſaid Term of 99 Years determinable as aforeſaid, unto the ſaid *Hugh* Lord Viſcount *Falmouth* his Heirs and Aſſigns at &c.; And that on 10*th October* 1759. N. S. (being *Michaelmas* Day, O. S.) 15*l.* of the ſaid yearly Rent of 5*l.* for three Years of the ſaid Term of 99 Years, became due and owing unto *Hugh* now Lord Viſcount *Falmouth*, to whom the Reverſion of the ſaid demiſed Premiſſes, ſubject to the ſaid Term of 99 Years, ſince the making of that Demiſe has duly come; Whereof the ſaid *Iſaac*, ſince the Death of the ſaid *Nicholas* and *James*, had Notice: Yet the ſaid *Iſaac* hath not yet, nor have or hath any other Perſon or Perſons yet paid the ſame or any Part thereof to the ſaid *Hugh* now Lord Viſcount *Falmouth*; but the ſaid *Iſaac* hath therein wholly failed; and the ſame and every Part thereof ſtill remains and are wholly due and owing and unpaid to the ſaid *Hugh* now Lord Viſcount *Falmouth*, contrary to the Form and Effect of the ſaid Indenture now brought into Court, and of the ſaid COVENANT *of the ſaid Nicholas* ſo made in that Behalf as aforeſaid. Then the Plaintiff alledges further, That on the ſaid 12th Day of *December* 1759, and for a long Time, to wit for the Space of 7 Years then laſt elapſed, All and ſingular the ſaid demiſed Premiſſes and every Part and Parcel thereof &c. were *ruinous and in great Decay*, for *Want of* needful and neceſſary repairing and amending &c: All which ſaid Premiſſes ſo being ruinous and out of Repair, the ſaid *James* and *Iſaac*, in the Life-time of the ſaid *James* after the Death of the ſaid *Nicholas*, And the ſaid *Iſaac Executor* as aforeſaid, ſince the Death of the ſaid *James*, *ſuffered and permited to be and continue* ſo ruinous and out of Repair, for and during all that Time and from thence hitherto; And neither they or either of them, or the ſaid *Joſeph*, or any other Perſon or Perſons have or hath as yet repaired the ſame or any Part therof; but have, and each of them hath therein wholly failed and made Default, contrary to the Form and Effect of the ſaid Indenture and of the aforeſaid COVENANT *of the ſaid Nicholas* ſo by Him made in this Behalf as aforeſaid. And ſo the ſaid *John* ſays that the ſaid *Nicholas* in his Life-time, and the ſaid *Iſaac* ſince his Death although often requeſted &c. have not nor hath Either of them kept with the ſaid *John* the aforeſaid COVENANT of the ſaid *Nicholas* ſo by Him made as aforeſaid, but *have* BROKEN *the ſame*, and to keep the ſame with the ſaid *John* have and Each of them hath hitherto wholly refuſed, And the ſaid *Iſaac*, *Executor* as aforeſaid, ſtill refuſes, To the ſaid *John's* Damage, 500*l.* And He brings into Court the Letters Teſtamentary of the ſaid *Samuel Enys* &c.

The Defendant demurs generally to this Declaration: And the Plaintiff joins in Demurrer.

This Caſe was firſt argued on *Friday* 24th *April* 1761, by Mr. *Gould* for the Plaintiff and Mr. *Walker* for the Defendant.

Mr.

* Mr. *Walker*——The Plaintiff, *as Executor*, ſues the Defendant, *as Executor* and aſſigns the Breaches in 1759. * P. 1194.

At the Time of the Plaintiff's Teſtator's making the Leaſe of 10th of *October* 1735, a former Leaſe of 27th *February* 1728, made by Him to the ſame Leſſees, was ſtill ſubſiſting.

Two Years after the Date of the ſecond Leaſe, *Nicholas Donnithorne* one of the Joint-Leſſees died: and the Defendant is his ſurviving Executor.

On this *ſecond* Leaſe, (of 10th *October* 1735,) He took 4 Exceptions.

1ſt. It is VOID for the *Uncertainty in the Commencement* of its Term.

2d. By the *Death of Nicholas Donnithorne* (One of the two Joint-Leſſees) on 10th *December* 1737, the whole Benefit of the Term and the Term itſelf, and the whole Charge, SURVIVED *to the ſurviving Joint-Leſſee, Joſeph Donnithorne.*

3d. It is improper for the Plaintiff to ſue *as Executor:* He ought to have ſued directly in his *own Name* abſolutely, and *not as Executor.*

4th. He is alſo improper in ſuing the Defendant *as Executor*: He ought to have ſued Him as *Aſſignee.*

Firſt Objection. The Term is *uncertain as to its Commencement:* It is by one Part of the *Habendum*, to commence "*from the* FIRST OF MARCH *preceding the Date* of this "ſecond Leaſe," (which was the firſt of *March* 1734;) And by another Part of it, to commence from the Sur-"render, Forfeiture, or other Determination of the former "Leaſe made in 1728," (which Determination of the former Leaſe happened on 1ſt *March* 1738.)

Second Objection. But ſuppoſing it to have any legal Operation the Term and the Benefit of it SURVIVED to the *ſurviving Leſſee*; And ſo alſo did the whole Charge of it: For *Nicholas Donnithorne died before the Term commenced.* And the *Covenants will not bind the Executors of the deceaſed Leſſee.* 5 *Co.* 18. *Slingſby's* Caſe, is applicable to the preſent Caſe: For here, the Eſtate was *jointly demiſed*; And the COVENANTS *can* NOT *operate* SEVERALLY.

Third Objection. It is improper for the Plaintiff to ſue *as Executor.* 1ſt. As to the Charge of the *Breaches*, which are laid in 1759: And the Plaintiff's Teſtator died in 1755

*P. 1195. * 2dly. As to the *Perſon charged*; becauſe of the Difficulty of the Defendant's making a Defence. And 3dly. Upon Account of *Coſts*: For he *ought not* to be *exempt* from Coſts; becauſe the Matter aroſe within his *own* Time.

Fourth Objection. He is alſo improper in ſuing the *Defendant* as *Executor*: It ought to be as *Aſſignee*. For the Defendant's Teſtator died *before any Entry*; and conſequently *before any Rent was due*.

Mr. *Gould*, *contra*, for the Plaintiff.—This Action is an Action of COVENANT; and brought upon a Covenant which is *joint* AND SEVERAL: And the Indenture is made "IN CONSIDERATION of the Rent AND COVENANTS on the Part of the Leſſees and their Executors, &c. to be obſerved and performed.

To the firſt Objection I anſwer—The Leaſe is *not* uncertain in its Commencement; becauſe it may be *rendered certain*. In Point of COMPUTATION, it commences from 1ſt *March* preceding the Date: But in Point of OCCUPATION, it is to *take Effect* only from the Expiration or other Determination of the firſt Leaſe made in 1728. It is a known Diſtinction which lies between a Leaſe commencing in *Computation* and commencing in *Poſſeſſion*. 1 *Ro. Abr.* 849. *pl.* 11. Title *Eſtate*, Letter Z. is *preciſely in Point*. *Ibid. pl.* 12. to the ſame Purport.

To 2d Objection. This Action is *founded upon the* COVENANT, which is joint AND *ſeveral*, by the two Leſſees; And They are Securities Each for the Other. This is not a Charge reſulting from the Benefit of enjoying the Land; but from a * *Covenant* which was one of the Conſiderations of making the Leaſe. 1 *Strange* 553. *Lilly* v. *Hedges*, *Tr.* 9. *G.* 1 *B. R.* "*One* Man may covenant for "the Act of *Another*."

*V. 2 *Ro. Abr.* 148. Tit. *Obligation*, Letter G. *pl.* 3. 4. 5. 6. 7.

To 3d Objection. It is impoſſible that Mr. *John Enys* can be intitled to the original Term, OTHERWISE *than as Executor or Adminiſtrator* of *Samuel Enys*: And it is only a Deſcription of his Title to the Term. And if he had really named Himſelf Executor *unneceſſarily*, this ſhall * *not* exempt Him from *paying Coſts*. For which, he cited a Caſe of *Jordan* v. *Powell*, *M.* 10 *G.* 2. *B. R.* Where the Plaintiff ſued as Adminiſtrator; and yet it was held to be only Surpluſage.

*V 1 *Strange* 682. *Portman* v. *Came*. S.P. *accord*.' See likewiſe *Harris*, *Executor*, v. *Jones*, *B. R. Thurſday* 26th *January* 1794. *poſt. pa.* 1451.

To 4th Objection. It was *impoſſible* to have ſued the Defendant *otherwiſe* than *as* being Executor. His Teſtator was bound by the Covenant. And Mr. *Enys* had nothing to do with any Agreement between his Leſſees. They could not, by any Act between themſelves, diſcharge themſelves from an expreſs Covenant. No Acceptance from an Aſſignee will diſcharge an *expreſs* Covenant.

Mr.

* Mr. *Walker*, in Reply—(1ſt.) This Leaſe was ſo uncertain in the Time it was to commence, that it could not be reduced to a Certainty: Neither does it diſtinguiſh when the Computation ſhall commence, and when the Intereſt or Poſſeſſion ſhall take Effect. *P. 1196.

2dly. Upon a joint Leaſe, the Covenants ſhall operate *only jointly*, not ſeverally. *Yelv.* 177. * *Rolls, Adminiſtrator of Rolls*, v. *Yate*. Therefore this Action could only be brought againſt the *Survivor*. The Caſe of *Lilly* v. *Hedges*, 1 *Strange* 553. does § not impugn what I ſay. But 1 *Saunders* 155. *Eccleſton et Ux' Executor of Caſtle* v *Clipſham*, is to the Purpoſe, and ſhews that the Covenant ſhall *go along with* the *Intereſt*.

* This Caſe does not at all prove his Poſition.
§ It does very ſtrongly.

3dly. The Plaintiff's Demand appears to be for Injuries in his *own Time*. Therefore, he cannot ſue for them as *Executor*.

4thly. The Law operates upon him as Aſſignee.

However, He chiefly relied on the firſt and ſecond Objections.

Lord MANSFIELD and Mr. Juſt. FOSTER were Both abſent at this Time.

Mr. Juſt. DENISON thought the ſecond Objection (which goes to the Point of the Action,) deſerved further Conſideration; *viz.* "Whether, where there is a *Joint-*"*Leaſe*, and where the Intereſt *muſt in its Nature ſurvive*, "the Covenants, though joint and ſeveral, muſt not be con-"ſtrued to *run with the Land*." It looks very odd, that when one of the Leſſees dies, and the Intereſt ſurvives to the longer Liver of them; yet the Other's Repreſentatives ſhould be bound by the Covenants, though *no Benefit remains to them*. And eſpecially it is right to conſider fully of the Objection, in a Caſe where the Plaintiff would otherwiſe ‡ loſe his Action.

‡ Note—In this Caſe, the Survivor happened to be inſolvent.

I would look into † *Slingſby*'s Caſe. †5 *Co.* 18. b.

Mr. Juſt. WILMOT alſo was willing to hear it argued again; as He thought that there might perhaps be *ſome* Weight in the *ſecond* Objection; though little or none in the *Reſt*.

Yet there ſeems to be a Doubt, Whether (as Mr. *Gould* ſays,) *One* Leſſee may not very reaſonably covenant *for Another*, as well as a *Stranger* might covenant *for Both*.

On the other hand, perhaps the Subject-Matter of the Covenant may make it reaſonable that it ſhould rather be conſtrued as a *Joint Covenant only*, ſince the *Intereſt* and *Benefit ſurvive*.

*P. 1197. * Whereupon, Mr. *Gould*, with Reſpect to this Conſtruction of the Covenant, and in Proof of its being joint *and ſeveral*, mentioned in the Caſe of *Robinſon* v. *Walker*, 1 *Salk.* 393. and likewiſe *Burden* v *Ferrers*, 1 *Siderf.* 189.

Upon its now ſtanding in the Paper for a ſecond Argument,

Mr. Serjeant *Poole*, for the Defendant, did not inſiſt on the 3d and 4th Objections: And though He did not give up the firſt, yet He only inſiſted on the ſecond. However, He could add nothing to what had been urged before.

And The COURT (being now full) determined againſt Him, without hearing Mr. *Norton* for the Plaintiff.

Lord MANSFIELD—On the 1ſt Point—It is either a Surrender of the former Leaſe; or if it is not, yet the new One is, in point of * *Intereſt*, to take its Commencement from the Determination of the former one only.

* *V.* 1 *Ro. Abr.* Title *Eſtate*, Letter Z. *pl.* 11 & 12.

2d Point—And the Action is brought upon a joint *and ſeveral* Covenant. The Difficulty only aroſe upon a *Miſrepreſentation* of *Slingſby*'s Caſe; which is nothing like this.

Mr. Juſt. DENISON ſpoke to the ſame Effect.

Mr. Juſt. FOSTER and Mr. Juſt. WILMOT were of the ſame Opinion.

Per Cur. unanimouſly,

JUDGMENT for the PLAINTIFF.

Saturday 6th June 1761.

Rex *verſ.* Walter Erle, Gent'.

MR. *Gould* ſhewed Cauſe againſt granting a *Mandamus* to the Defendant, *Treaſurer* of the County of *Dorſet*, requiring Him as Treaſurer of the ſaid County to *reimburſe* and pay to *Richard Buckland* and *Edward Andrews*, *late Conſtables of the Burrough* of *Shafton*, otherwiſe *Shafteſbury* in the County of *Dorſet*, the ſeveral Sums of Money (mentioned in the Paper-Writing annexed to the Affidavit of the ſaid *Richard Buckland* and another) expended by them in conveying and maintaining ſeveral Rogues, Vagabonds, and other idle and diſorderly Perſons, according to an Order made at the General Quarter Seſſions of the Peace holden at *Shafteſbury* on the 10th Day of *July* 1744, in Purſuance of an Act of Parliment made

17 *G.*

* 17 G. 2. intitled "An Act to amend and make more "effectual the Laws relating to Rogues, Vagabonds, and "other idle and diſorderly Perſons, and to Houſes of Cor- "rection." * P. 1198.

V. 12 *G.* 2. *c.* 29. §. 6. and 17 *G.* 2. *c.* 5. §. 1. 4. 16. 17.

He inſiſted that the SESSIONS have a Juriſdiction to *examine into the Accounts* of the Conſtables: Whereas theſe are only allowed by a *ſingle Juſtice*.

Mr. *Norton*, *contra*, for the *Mandamus*, denied that the Seſſions have any Juriſdiction to over-hale the Conſtables Accounts.

This is the only Remedy we have. They may return what they think proper, if they think their Point maintainable.

Here is no Chief Conſtable in this Burrough: Therefore We are obliged to apply to the Treaſurer.

LORD MANSFIELD—They are obliged by the Act to apply to the *Quarter-Seſſions*; and the *Surplus* only is to be paid over: Which ſhews that the *Seſſions have a Juriſdiction* to make Deductions.

There is Waſte enough, upon theſe Occaſions, already.

Diſcharge the Rule.

The RULE was accordingly DISCHARGED.

Hamilton *verſ.* Mendes.

Monday 8th *June* 1761.

THIS was a Special Caſe reſerved at *Guildhall*, at the Sittings there before Lord *Mansfield* after *Michaelmas* Term 1760, in an Action brought againſt the Defendant as One of the Inſurers, upon a Policy of *Inſurance* from *Virginia* or *Maryland* to *London*, of A SHIP *called the Selby*, and of Goods and Merchandize therein, until ſhe ſhall have moored at Anchor 24 Hours in good Safety.

The Caſe ſtated for the Opinion of the Court was as follows—

That the Ship *Selby*, mentioned in the Policy, being valued at 1200*l.* and the Plaintiff having Intereſt therein, cauſed the Policy in Queſtion to be made; and the ſame was accordingly made, in the Name of *John Mackintoſh*, on Behalf and for the Uſe and Benefit of the Plaintiff, and which was ſubſcribed by the Defendant, as ſtated for the Sum of 100*l.* Facts ſtated.

That

* P. 1199. * That the Ship, being of the Burden of Two Hundred Tons, was on the 28th of *March*, 1760, in good Safety at *Virginia*; where ſhe took on Board 192 Hogſheads of Tobacco, to be delivered at *London*.

That on the ſaid 28th Day of *March*, She departed and ſet Sail from *Virginia* for *London*; and on the 6th Day of *May*, following, as She was ſailing and proceeding in her ſaid Voyage, was taken by a *French* Privateer called the *Aurora* of *Bayonne*, Captain *Jean Piena Leſea* Commander; who, with his Company, were Subjects of the *French* King, then being at War with our Lord King *George* the Second.

That at the Time of the Capture, the *Selby* had Nine Men on Board; and the Captain of the ſaid Privateer took out Six, beſides the Captain, *Dorſdill*; leaving only the Mate and One Man on Board.

That the *French* put a Prize-Maſter and ſeveral Men on Board the ſaid Ship *Selby*, to carry her to *France*.

That as the *French* were carrying the ſaid Ship *Selby* towards *France*, on the 23d Day of the ſaid *May*, She was retaken off *Bayonne* by the *Southampton*, an *Engliſh* Man of War commanded by Captain *Antrobus*; who ſent her into *Plymouth*, where She arrived the Sixth Day of *June* following.

That the Plaintiff living at *Hull*, as ſoon as he was informed what had befallen his ſaid Ship the *Selby*, wrote a Letter, on the 23d Day of *June*, to his Agent *John Mackintoſh*, living in *London*, to acquaint the Defendant, "That "the Plaintiff did from thenceforth ABANDON to him his "Intereſt in the ſaid Ship, as to the ſad One Hundred "Pounds by the Defendant inſured."

That the ſaid *John Mackintoſh*, on the 26th Day of the ſaid *June*, acquainted the Defendant with an Offer to abandon the Ship: To which the Defendant ſaid "*He did not* "*think himſelf bound to take to the Ship*; but was ready to "*pay* the Salvage and all other Loſſes and Charges that "the Plaintiff ſuſtained by the Capture."

That upon the 19th Day of *Auguſt*, the ſaid Ship *Selby* was brought into the Port of *London*, by the Order of the Owners of the Cargo and the Re-Captors.

That the ſaid *Ship Selby ſuſtained* no Damage from the Capture.

That

*That the whole Cargo of the ſaid Ship *Selby* was deliverd to the Freighters at the Port of *London*; who paid the Freight to *Benjamin Vaughan*, without prejudice. * P. 1200.

The Queſtion therefore ſubmitted to the Opinion of the Court in this Caſe, is,—"Whether the Plaintiff, on the ſaid "26th Day of *June*, had a *Right to* ABANDON, and hath "a Right to recover as for a *Total* Loſs." If He is intitled to recover for a *Total* Loſs; then the Jury find a verdict for the Plaintiff, Damages 98*l.* Coſts 40*s.* But if the Court ſhall be of Opinion, that he had *no* Right to abandon on the ſaid 26th Day of *June*, or he ought only to recover an *Average* Loſs; then the Jury find a verdict for the Plaintiff, Damages 10*l.* Coſts 40*s.*

Flet. Norton, for Plaintiff.
H. Gould, for Defendant.

This Caſe was firſt argued on *Friday* 10th *April* laſt, by Mr. *Morton* for the Plaintiff, and Mr. *Aſton* for the Defendant.

Mr. *Morton*—The Queſtion, is Whether, by Law, the Inſurers are ſubject to a TOTAL, or only to an AVERAGE Loſs.

The CAPTURE of the Ship by an Enemy does amount to a *total* Loſs of it. *Roccius Pa.* 282. *Reſpons.* 34. And upon a *total* Loſs the Ship being *in this Country*, the Inſured may always abandon. On 13*th December* 1759, in the Caſe of *Gardiner* v. *Broſnall* before Lord *Mansfield* at *Guildhall*, it was ſo ſettled, "That on a *total* Loſs, the Inſured may "always abandon, *if in our* OWN Country:" (though there indeed the Ship was in a *foreign* Port.)

This is a *valued* Policy: And the Inſurer having received a ſufficient Premium, the Inſured ought, in Point of Juſtice and Equity, to have a Right of *Election* whether to keep or to abandon the Thing inſured. And when the Inſured has once had his Election to demand the Money inſured, no *ſubſequent* Event can take it from Him. For, the Peril inſured againſt having actually happened, the Condition of the Contract is broken, on the *Inſurer's* Part: And when a Condition is once broken, no *ſubſequent* Event can hinder the other Party from inſiſting upon it. Nor can an Abandonment be partial.

In the Caſe of *Fitzgerald* v. *Pole*, in the, Houſe of Lords, many Caſes are * cited in the Margin, where the Plaintiffs had Judgment as for a total Loſs, though the Ships remained in being.

*See *Caſes in Dom' Proc' Wedneſday* 13th *February* 1754.

Lord MANSFIELD—But they were abſolutely denied by the other Side.

Mr.

*P. 1201. * Mr. *Morton*—Yet even *General* Verdicts AGAINST Inſurers are an Authority. But the *Circumſtances* here found do plainly conſtitute a *total* Loſs, ſo as to make the Inſurers liable—*Roccius* 227. Note, 66, and * *Goſs* v. *Withers*, in this Court.

* *M.* 1758. 32 *G.* 2. *B. R. ante, pa.* 683 to 698.

Grotius holds a Detention of 24 Hours only to be ſufficient. *Lib.* 3. *c.* 6. *Pa* 814. "*Sed recentiori Jure Gentium, &c.*" And even *Bynkerſhoek* admits it to be ſo, *after* all reaſonable Hopes of Recovery are gone. *Lib.* 1. *c.* 4. And here all Hope of Recovery was gone: The ſhip was detained in the Hands of the Enemy from the 6th of *May* to the 23d of *May*. The Hands too were taken out. Conſequently, the Inſured might be hurt: And therefore, on a valued Policy, He might abandon.

Mr. *Aſton*, *contra*, for the Defendant.—This mere Capture, followed by a Re-Capture *before* it was taken *infra Preſidia Hoſtium*, is *not a total* Loſs, nor can intitle the Inſurer to *abandon*.

Abandoning is a term that imports ſomething left to be abandoned: Which can *not* be ſaid, if the Loſs be abſolutely and ſtrictly ſpeaking *total*.

The Right to abandon muſt ariſe upon the End being *ſo far* defeated, that it is not worth the While of the Inſured to purſue it; ſuch a Loſs as is equally *inconvenient* to Him, *as if it had been* a total Loſs. *Ordinances of France* 181. *Art.* 45. *Sea-Laws. Magen's* Book, ‡ (where they are tranſlated, and the Word Abandoning is firſt uſed.)

‡ Eſſay on Inſurances, Vol. 2. *pa.* 174, 175. Art. 42. et ſequen.'

The Hope of Recovery being quite gone, depends upon its being *in loco ſecuro*, brought into a Place of Safety. *Conſolato del Mare*, *c.* 287. *Bynkerſhoek* 9. *Juris Publici*, *cap.* 5. *lib.* 1. And *Roccius* is agreeable to both theſe two. Therefore a *bare* Taking at Sea is not enough to make it a total Loſs. It was never *in loco ſecuro*; but only carrying *towards France*.

In 1665, it was not the Notion, "That a Ship was *to-*" *tally* loſt, which *might* come to Light again." And agreeable to this is *Roccius's Notabilia*, 50. *Pa* 204. ‡ "*Non* "*autem deperditæ, ſi poſtea reperiantur.*" All the † Books that ſpeak of the Aſſured's Right to abandon, are to be underſtood of *ſubſiſting* Perils.

‡ See the whole Paſſage, *poſt.*

†*Edict Lewis* 14. *Art.* 46. *Ordin.* 26. *Ordin. Bilboa* 1738. *Artic.* 32. *Ordinance of Middleburgh in Zealand* 1689. *Art. Rotterdam* 1721. *Artic.* 62. 64.

Now this Ship was *reſtored undamaged*, and *in as good Plight as before*: And if it had not been in quite ſo good Plight, yet

* yet it would only be a Loſs in *Proportion* to the Damages. * P. 1202.
Roccius ut ſupra. A Ship cannot be abandoned, ſo long as it will ſwim.

The Caſe of *Goſs* v. *Withers* turned upon *particular Circumſtances:* But the General Doctrine of that Caſe is with Us. There, the Loſs was total *at the Time* of abandoning: Here, it was not. There, the Ship was diſabled to purſue her deſtined Voyage; The Goods were periſhable, and the *Lent*-Seaſon for the Sale of the Fiſh was over: But here the Ship was perfectly *ſafe* and *able to purſue* her Voyage, at the Time of abandoning; She was *completely redeemed* from her Peril, *undamaged*; and came Home ſo, to her deſtined Port.

The Caſe of *Gardiner* v. *Broſnall* turned upon other Queſtions.

There is *no Difference* between a *valued*, and an *open* Policy, where the Loſs is only *partial*, and not total: For the *Value* muſt be *proved* in the Caſe of a partial Loſs; And the *Intereſt* muſt be *proved*, if it was a *total* Loſs.

In Order to give the Inſured a Right to abandon, the Peril muſt *ſubſiſt* at the Time of abandoning.

Therefore here, the Inſured are only intitled to an *Average*-Loſs.

Mr. *Morton*, in Reply—This is an Inſurance againſt the Taking of a Ship; Which Ship *has been* taken. The Facts ſtated amount to a *Breach* of the Inſurer's Contract: And *Subſequent Events* can not alter the Caſe. The Voyage was *delayed* and *defeated*, for a *Month*; the Ship was *without Sailors*; and it was brought into a Port We were Strangers to.

The Caſe of *Goſs* v. *Withers* was particularly circumſtanced; yet the * *General Doctrine* was laid down, "that if * *V. ante* 696, 697.
"an inſured Ship be taken, the Aſſured may demand as
"for a *total* Loſs, and may *abandon* to the Inſurer." Here, as well as there, the *Views* of the Inſured were *defeated.*

The Inſurer *might* poſſibly have been a Gainer by the Ship being abandoned to Him, under his Right of Salvage.

Note—

It was admitted on both Sides, that there was no Caſe where there had been an ‡ Adjuſtment of a *partial* Loſs upon a *valued* Policy; nor any Determination that its being

‡ It muſt be obſerved that at this Time, the Caſe of *Lewis* v. *Rucker* (reported *ante* 1167) had not received its Determination; nor had ever been mentioned in Court: The very firſt Motion in that Caſe was made upon the next Day after this firſt Argument of the preſent Caſe; and it was not determined till 2d *May*, 1761.

*P. 1203. * a VALUED Policy turned it into a *Wager*, and ſo differed it from the Caſe of an OPEN Policy, (which is a Contract of *Indemnity*.)

THIS Cauſe came on again (in the Paper) to be argued a ſecond Time, on *Tueſday* the 26th of *May* laſt (1761.)

Mr. *Norton* argued on behalf of the Plaintiff—the Queſtion is now narrowed almoſt to a Point, by a late * Determination: For I can not now argue that a *valued* Policy is to be conſidered upon the ſame Foot with a *Wagering* Policy; ſince it has been † determined "that there is no Dif-"ference between a valued Policy and an open One, ex-"cept fixing the Quantum of the Value of the Goods as "to their *prime* Coſt."

* *V. Lewis* v. *Rucker*, *ante* 1171. 1172, 1173. (See the preceding Note).

† *V. ante* 1771, 1772.

And the Damage, upon an Average-Loſs, muſt be ‖ computed (as it is *now* ſettled) according to the Price of ſound Goods at the Port of Delivery, at the Time of Arrival there. But

‖ *V. ibidem.*

In all valued Policies, where the Valuation is exorbitantly high, and the Intereſt on Board is very trifling, that is a mere Evaſion; it is a Fraud upon the Statute of 19 *G.* 2. *c.* 37. and ſhall be treated as a mere Cover to a Wager. Therefore the Doctrine of Wagering Policies is not applicable to the preſent Caſe, ſince theſe Points have been ‡ ſettled.

‡ *V. as above.*

It muſt alſo now be taken, that an Inſurance of a Ship or Goods is to be looked upon as only an Indemnity for their ſafe Arrival at their deſtined Port.

Nevertheleſs I muſt contend for two Propoſitions, Which ſtill remain to Me, and are theſe—

1ſt. There was a Time ONCE EXISTING when the Inſured *had* a *Right to abandon*, and to recover from the Inſurer as for a *total* Loſs.

2d. Nothing has here happened, to *take this Right away* from them.

But I will firſt clear the Caſe from Objection.

It has been objected, "that an Abandonment is incon-"ſiſtent with a total Loſs."

Anſwer—

An *Abandonment* is a relinquiſhing of whatever may be ſaved, for the Benefit of the Inſurer: And a *total Loſs* is where Nothing is ſaved, worth the while of the Owner to purſue.

*purſue. There can ſcarce be any Inſtance of a total Loſs in *this* Senſe of the Term, where there is not ſomething ſaved. * P. 1204.

In the Caſe of a *Capture*, the Thing itſelf is as far from being really *deſtroyed* or *annihilated*, as it was when in the Hand of the Owner: But yet it is totally loſt *to* the Owner; His *Dominion* over it is totally gone. There may be an Abandonment even upon an *Embargo*, if the Cargo be periſhable.

This Objection being cleared, I come to the two Propoſitions before ſtated.

Firſt—Here did *once exiſt* a total Loſs; and conſequently there exiſted, at that Time a Right of abandoning.

Since the Caſe of * *Goſs* v. *Withers*, it ſtands ſettled " that where the Hope of Recovery is gone, a *Capture* " makes a total Loſs, as between *Inſurers and the Inſured.*" If carried *infra Præſidia Hoſtium*, then even the Right of † *Property* is altered: So alſo, if all Hope of Recovery is gone. * *V. ante* 696, 697. † *V. ante* 693.

Now here were no Hopes of Recovery left: The Ship was 17 Days in the Hands of the Enemy; and only One Man and One Boy left on Board. The Inſured might *then* have called upon the Inſurer for a *Total* Loſs; and He could have had no Excuſe. It will perhaps be ſaid, that it was *not a* CONTINUING Loſs upon the 26th of *June*, becauſe the Ship was before that Time retaken and ſafe. But the Anſwer to that is, " that it was total ſo long as it " continued."

I will therefore now conſider the ſecond Queſtion.

Second Queſtion—Whether the *ſubſequent Events* have *taken away* the Inſured's Right to abandon: As the Inſurance is only an indemnity for the Ship's ſafe Arrival at its deſtined Port; and as the Ship arrived at that Port, without having ſuſtained any Damage from the Capture; and the Inſurer is content to pay the Salvage and all Coſts.

Notwithſtanding all this, I ſay that where there was ONCE a *total* Loſs, or a Loſs of ſuch a kind as is *in its Nature total*, the Inſured have a Right to abandon, *although* there be a ſubſequent Re-Capture: For, when once the Inſured had a Right to abandon, veſted in Him, ſuch Right *continued* in Him, and could not be taken away from Him.

And § ſo I underſtood it to be laid down, in the Caſe of *Goſs* v. *Withers*. § *V. ante ut ſupra.*

A Right of Action once *veſted* cannot be deveſted.

This

* P. 1205. *This may be compared to a *Condition* once broken: Which Caſe is juſt like the preſent. And a Right to abandon follows of Courſe.

Here is *no Fraud found:* And none can be preſumed or intended. There is *no Injury* done to the Inſurer, by the Abandonement: For the Value is agreed to be 120, and not pretended to be over-valued. He has received a Premium upon that, as the Value; And if no Damage has been ſuſtained, He will be reimburſed by that Value; (except the Salvage, which He muſt anſwer for, in either Caſe.) And this muſt be taken for a fair Valuation; no other being found or pretended: *If* it had been exceſſive, it might have been ſhewn by the Inſurer, and He might have got rid of the Policy as fraudulent. And upon all the Circumſtances of the Caſe, there was very ſufficient Reaſon for Abandoning.

It has been ſaid, "That the Laws and Ordinances of "Foreign Countries will not admit a Ship to be abandoned, ſo long as it can ſwim."

I anſwer—Thoſe Laws and Ordinances are not applicable to *Captures.* They are political, in Order to oblige the Maſter and Men to give their utmoſt Diligence to ſave the Ship, if poſſible, from *ſinking.* And all the Foreign Writers put a *Capture* and a *Shipwreek* upon the very *ſame Foot:* Which proves our *Right* to abandon here. *Ordinance* 46*th.* * And ſo alſo they put it upon the ſame Foot with a Detention by Princes. Therefore they affirm our Right to abandon in the preſent Caſe.

*V. Magens. Vol. 2. pa. 175.

It has been objected "That the Ship was in *Safety* on "the 26*th of June*," (the Time when the Offer to abandon was made.)

But I *deny* that She was in *Safety, quoad the Inſurer:* He had no more Dominion or Power over the Ship on 26th of *June*, than he had when She was in the Hands of the Enemy. The Re-Captor had a Right to an eighth Part of the Ship for Salvage; and He had a Right to SELL it, and *did actually ſell it* And the Inſured *could not hinder* this: He had only a Right to $\frac{7}{8}$ of the Price it ſhould fetch.

It has been likewiſe objected, "That if the Inſured "may always be at Liberty to abandon, in Caſe of a Capture and Recapture, it would oblige all Inſurers to act "as Merchants, and meddle in Things which they do "not or may not all underſtand."

But that Argument proves too much: For, it holds equally ſtrong in *all* Caſes of Abandonment; and would therefore equally tend to prove "That there can be no "Abandonment in *any* Caſe."

It

* It has been ſaid "That it would *introduce Fraud.*" * P. 1206.

But Fraud is *not to be preſumed.*

I hope therefore that this Court will concur with foreign Writers, That there is no inſtance where, in Caſe of a Capture and Recapture, and the Loſs total in its Nature. there may not be an Abandonment And ſo it was determined in the Caſe of *Goſs* v. *Withers.*

Here, the total Loſs *veſted a Right* to abandon; which Right could not be deveſted by the Recapture: And no Injury is done to the inſurer, nor can any Inconvenience ariſe.

Therefore the Plaintiff ought to recover the 98l. as for a total Loſs. This is a firm ſtable ground to go upon, in Caſes of Capture: And unleſs this fixed Rule be eſtabliſhed, there muſt be infinite Uncertainty and diſpute in every Caſe of Capture and Recapture.

Mr. *Gould, contra,* for the Defendant.—Every Thing was ſaid laſt Term, in the Argument for the Defendant, that poſſibly could be urged upon the ſubject.

Mr. *Aſton* did not inſiſt That a total Loſs muſt be an abſolute Annihilation of the thing inſured.

The determination in the Caſe of *Goſs* v. *Withers* was founded upon the particular Circumſtances of that caſe; and the Doctrine was not laid down ſo generally as Mr. *Norton* cites it.

As to its having been *once* a total Loſs, and *continuing* ſo till 26th of *June*, and the *Spes recuperandi* being utterly gone by the Capture; the Point was ſettled in that Caſe of *Goſs* v. *Withers.* * * *V. ante* 693 to 698.

Mr. *Norton* admits, that both in the caſe of a *valued* and of an *open* Policy, the Inſurance is to be conſidered only as an INDEMNITY: Whereas his Argument would prove the Inſurer to be liable to have the Ship abandoned to Him though retaken within an Hour.

The ſubſtantial Inquiry is, "Whether any of the perils "inſured againſt, have happened, *to the Detriment* of the "Ship, SO FAR as to intitle the Inſured to abandon, *within* "*the true Intent of the Policy.*"

Roccius, 204, (cited by Mr. *Aſton*) proves that *Reſtoration* before Payment is ſufficient, and the Inſurer is clear:— "Acetiam quia Contractus Aſſecurationis eſt conditionalis, "&c.

* P. 1207. " * &c. reperiantur. Non autem deperditæ dicuntur, *ſi* " *poſtea reperiantur.*" The Book goes on and ſays, " *If* " the inſured *had called upon* the inſurer, *before* the Recap- " ture, &c. THAT might have made a great Difference."

It would be too rigorous, to allow an Abandonment by the Owner (who *underſtands* the beſt Method of managing the thing inſured) to an Inſurer who does not underſtand it; unleſs the Thing be *rendered* REALLY USELESS *to the owner himſelf*. There is no Inſtance of an Attempt to abandon a Ship at a *Time when it is in Safety.*

There can be no ſolid Ground to diſtinguiſh between the Caſe of a *Ranſom*, and the Caſe of *Salvage* to be paid upon a Recapture, at the Rate of $\frac{1}{8}$ of the value, under a poſitive Act of Parliment.

The Caſe of *Dean* v. *Dicker*, 2 *Strange* 1250, was upon a Policy " *Intereſt or no Intereſt*:" And therefore the Recapture was holden not to avail the Inſurer. But the Ch. Juſtice ſaid, at the Concluſion of the Caſe, " It might be " *otherwiſe* on a *valued* Policy."

As to the *Inconvenience*—It is obvious that abandonment muſt be exceedingly ſo to the Under-Writer, who may not underſtand the Thing, and may reſide at a great Diſtance from the Place of the Ship's Arrival.

And as to *Fraud*—Though *particular Facts of Fraud are* not to be preſumed, yet the Court will prevent Fraud, as far as lies in their Power: Whereas *Enlarging* the Right to abandon will certainly *encourage* it.

This Peril was *over* and at *an End*, *before* the Offer to abandon was made; and the Ship had received no Damage by the Capture: And therefore the Plaintiff ought only to recover as for an *Average*-Loſs, and to be content with the 10*l.* Damages given him by the Jury,

Mr. *Norton*, in Reply—A *ſpecific Reſtitution* of the Ship may happen not to be a Satisfaction to the Inſured.

The *Recaptor has a Right to ſell* the Ship; and by that, to ſecure his $\frac{1}{8}$ for Salvage.

There is a ſubſtantial Difference between *Ranſom* and *Salvage*. One is an Act of the *Owner* (or his Agents;) the other, the Act of a *Stranger*: And a Ranſom is an *Election to take an Average*-Loſs, inſtead of demanding as for a total One.

Roccius

* *Roccius* 204. is a general Aſſertion; which may depend upon Circumſtances, and is not applicable to the preſent Caſe. The General Poſition is not Law. * P. 1208.

My Argument *ab inconvenienti* has Weight, if this be a *total* Loſs; as it certainly is, and was determined to be ſo, in the Caſe of *Goſs* v. *Withers*.

The Caſe of *Dean* v. *Dicker* is not applicable to this Caſe. CUR. ADVIS'.

Lord MANSFIELD now delivered the Reſolution of the Court; having firſt ſtated the Caſe, as ſettled at *Niſi Prius*.

The Plaintiff has averred in his Declaration, as the Baſis of his Demand for a *total* Loſs, "that by the Capture the "Ship became wholly loſt *to Him*."

The General Queſtion is, Whether the Plaintiff, who at the Time of his Action brought, at the Time of his Offer to abandon, and at the Time he was firſt apprized of any Accident having happened, had only, in Truth, ſuſtained an Average-Loſs, ought to recover for a *Total* One.

In Support of the Affirmative, the Counſel for the Plaintiff inſiſted upon the four following Points:

1ſt. That by this Capture, the *Property was changed*, and therefore the Loſs total for ever.

2dly. If the Property was not changed, yet the Capture was a *total* Loſs.

3dly. That when the Ship was brought into *Plymouth*, particularly *on the 26th of June*, the Recovery was not ſuch as, in Truth, *changed* the Totality of the Loſs into an Average.

4thly. Suppoſing it did, yet the Loſs having *once* been total, a Right *veſted* in the Inſured to recover the Whole upon abandoning; which Right could never afterwards be *deveſted or taken from him* by any ſubſequent Event.

As to the *firſt Point*—IF the Change of Property was at all material *as between the Inſurer and Inſured*, it would not be applicable to the preſent Caſe: Becauſe, by the marine Law received and practiſed in *England*, there is no Change 1ſt. Point.

* P 1209. ‡ V. ante 693, 694. † V 29 G. 2. c. 34 §. 24. " and at " ANY " Time afterwards " retaken." 2d. Point.

* Change of Property, in Caſe of a Capture, before ‡ *Condemnation*: And now, by the Act of Parliament, in Caſe of a Re-capture, the *Jus Poſtliminii* continues for *ever*. †

I know, many Writers argue, between the Inſurer and Inſured, from the Diſtinction " Whether the Property was " or was not changed by the Capture, ſo as to transfer a " complete Right from the Enemy *to a Recaptor* or *neutral* " *Vendee*, againſt the former Owner." But arbitrary Notions concerning the Change of Property by a Capture, as between the former Owner and a Re-captor or Vendee, ought never to be the Rule of Deciſion, as between the *Inſurer* and *Inſured* upon a *Contract of Indemnity*, contrary to the real Truth of the Fact. And therefore I agree with the Counſel for the Plaintiff, upon their ſecond Point, " That by this Capture, " while it continued, the Ship was *totally* loſt," though it be admitted " that the Property, in Caſe of a Re-capture, " never was changed, but returned to the former Owner."

3d. Point.

The third Point depends, as every Queſtion of this kind muſt, upon the *particular Circumſtances*. It does not *neceſſarily* follow, that, becauſe there is a Re-capture, therefore the Loſs ceaſes to be total. *If* the Voyage is abſolutely loſt, or not worth purſuing; *If* the Salvage is very high; *If* further Expence is neceſſary; *If* the Inſurer will not engage, in all Events, to bear that Expence, though it ſhould exceed the Value or fail of Succeſs: Under theſe and many other like Circumſtances, the Inſured may diſintangle himſelf and abandon, *notwithſtanding* there has been a Re-capture. *

* V. ante 697. accord'.

† *Cap.* 7. *Sect.* 1.

The *Guidon* † among other Deſcriptions of a total Loſs where the Inſured may abandon, inſtances " If the Damage " exceeds half the Value of the Thing; or if the Voyage be " loſt; or ſo diſturbed, that the Purſuit of it is not worth the " Freight." But in the preſent Caſe, the Voyage was ſo far from being loſt, that it had only met with a ſhort *temporary* Obſtruction; the Ship and Cargo were both *entirely ſafe*; the Expence incurred did not amount to *near* Half the Value; and upon the 26th of *June*, when the Ship was at *Plymouth*, and the Offer made to abandon, the Inſurer *undertook to pay all Charges and Expences* the Plaintiff ſhould be put to by the Capture.

The only Argument to ſhew that the Loſs had not then ceaſed to be total, was built upon a miſtaken Suppoſition, " that the Re-captor had a Right to demand a *Sale*, and to " put a *Stop* to any further Proſecution of the Voyage." But that is not ſo The Property *returned* to the Plaintiff, pledged to the Re-captors for One Eighth of the Value, as Salvage for retaking and bringing the Ship into an *Engliſh* Port. Upon paying this, the Owner was intitled to § *Reſtitution*. The Re-captor had *no Right to ſell* the Ship.

§ V. 29 G. 2. 34.

If

* If they differed about the Value, the Court of Admiralty would have ordered a Commiſſion of Appraiſement. In this Caſe, it was the *Intereſt* of the Owner of the Ship, the Owners of the Cargo, and the Re-captor, that She ſhould forthwith *proceed* upon her Voyage from *Plymouth* to *London*. But, had the Re-captor oppoſed it, or affected Delay, the Court of Admiralty would have made an *Order* for bringing her immediately to *London*, her Port of Delivery, upon reaſonable Terms. * P. 1210.

Therefore it is moſt clear, that upon the 26th of *June*, the Ship had ſuſtained no other Loſs by reaſon of the Capture, than a *ſhort temporary Obſtruction*, and a Charge which the Defendant had *offered to pay* and ſatisfy.

This brings the Whole to the fourth and laſt Point. 4th Point.

The Plaintiff's Demand is for an *Indemnity*. His Action, then, muſt be founded upon the *Nature of his Damnification*, as it really is, at the *Time* the Action is brought. It is repugnant, upon a Contract of *Indemnity*, to recover as for a *total* Loſs, when the final Event has decided that the Damnification, in Truth, is an *Average*, or perhaps *no* Loſs at all.

Whatever undoes the Damnification, in Whole or in Part, muſt operate upon the Indemnity in the *ſame Degree*. It is a Contradiction in Terms, to bring an Action for Indemnity, when, upon the whole Event, *no* Damage has been ſuſtained. This Reaſoning is ſo much founded in Senſe and the Nature of the Thing, that the Common Law of *England* adopts it; (though inclined to Strictneſs.) The Tenant is obliged to indemnify his Landlord from *Waſte*: But if the Tenant do, or ſuffer Waſte to be done, in Houſes; yet, if he *repair before any Action brought*, there lies no Action of Waſte againſt him: * But he cannot plead "*non feci* vaſtum;" but the Special Matter. The Special Matter ſhews, that the Injury being repaired *before* the Action brought, the Plaintiff had *no Cauſe* of Action: And whatever takes away the *Cauſe*, takes away the *Action*. * *C. Lit.* 53. *a.*

Suppoſe a *Surety*, ſued to Judgment; and afterwards, *before* an Action brought, the Principal pays the Debt and Coſts, and procures Satisfaction to be acknowledged upon Record: the Surety can have no Action for Indemnity: becauſe he is indemnified *before* any Action brought. If the Demand or Cauſe of Action does not ſubſiſt *at the Time* the Action is brought, the having exiſted at any *former* Time can be of no Avail.

* P. 1211. * But, in the preſent Caſe, the Notion of a "*veſted* Right "in the Plaintiff, to ſue as for a total Loſs before the Re-"capture," is *fictitious* only, and not founded in Truth: For the Inſured is not *obliged* to abandon, in *any* Caſe: He has an *Election*. No Right can *veſt as for a total* Loſs, till he has *made* that Election. He cannot elect before *Advice is received*, of the Loſs: And if that Advice ſhews the Peril to be *over*, and the Thing in *Safety*, he *cannot elect at all*; becauſe he has no Right to abandon, when the Thing is *ſafe*.

Writers upon the Marine Law are apt to embarraſs General Principles, with the poſitive Regulations of their own Country: but they ſeem all to agree, "That if the Thing "is recovered *before* the Money paid, the Inſured can only "be intitled according to the *final* Event."

Roccius, who collects the Opinions of all the Authors before his Time, and draws Concluſions or Maxims (Solutions of Queſtions) from them, which he calls *Notabilia*, in the Place cited at the Bar, (*Fo.* 204. *Not.* 50.) puts this Queſtion—"Aſſecurator, qui jam ſolvit Æſtimationem Mer-"cium deperditarum, ſi poſtea dictæ Merces appareant, et "recuperatæ ſint, an poſſit cogere Dominum ad accipiendas "illas, & ad reddendam ſibi Æſtimationem, quam dedit?" The Anſwer is—"Diſtingue. Aut Merces, vel aliqua "Pars ipſarum appareant, & reſtitui poſſint, *ante Solutionem* "*Æſtimationis*; & tunc tenetur Dominus Mercium illas "*recipere*, & pro illâ parte Mercium apparentium *libera-*"*bitur* Aſſecurator: Nam qui tenetur ad certam quanti-"tatem reſpectu certæ Speciei, dando illam, liberatur, ut "ibi probatur. Et etiam, (another Reaſon, perhaps a "better) quia Contractus Aſſecurationis eſt conditionalis; "ſcilicet, *ſi* Merces *deperdantur*: NON autem dicuntur "deperditæ, ſi poſtea *reperiantur*. Verum ſi Merces non "appareant in illa *priſtina bonitate*, aliter fit Æſtimatio; "*non in totum*, ſed *prout hinc valent*. Aut vero *poſt* ſolu-"tam Æſtimationem ab Aſſecuratore, compareant Mer-"ces: & hinc eſt in Electione Mercium aſſecurati, vel re-"cipere Merces, vel retinere pretium."

* Before L.d. *Hardwicke*, at *Guildhall*, in 1735. In the Caſe of * *Spencer* v. *Franco*, though upon a Wager Policy, the Loſs was held *not* to be total, after the Return of the Ship *Prince Frederick* in Safety; though She had been *ſeiſed and long kept* by the King of *Spain*, in a Time of actual War.

† *V. ante* 1200. in *Margine*. In the Caſe of † *Pole* v. *Fitzgerald*, though upon a Wager Policy, the Majority of the Judges and the Houſe of Lords held there was *no total* Loſs, the Ship having been *reſtored* before the End of the *Four Months*.

The

* The preſent Attempt is the firſt that ever was made, to charge the Inſurer as for a total Loſs, upon an Intereſt-Policy, after the Thing was recovered. And it is ſaid, the Judgment in the Caſe of *Goſs* v. *Withers* gave Riſe to it. * P. 1212.

It is admitted, that Caſe was no Way ſimilar. Before that Action was brought, the whole Ship and Cargo were literally loſt; at the Time of the Offer to abandon, a Fourth of the Cargo had been thrown over-board; The Voyage was entirely loſt; The Remainder of the Cargo was Fiſh periſhing, and of no Value at *Milford Haven*, where the Ship was brought in; The Ship ſo ſhattered, as to want great and expenſive Repairs; The Salvage was one Half, and the Inſurer did not engage to be at any Expence; It did not appear that it was worth while to try to ſave any Thing; And the Re-captor, (though intitled to one half, as well as the Owner of the Ship and Cargo,) left the Whole to periſh, rather than be at any further Trouble or Expence.

But it is ſaid, "Though the *Caſe* was entirely different, "ſome part of the *Reaſoning* warranted the Propoſition "now inferred by the Plaintiff from it."

The great Principle relied upon, was, "that as between "the Inſurer and Inſured, the Contract being an Indemni-"ty, the *Truth* of the Fact ought to be regarded: And "therefore there might be a total Loſs by Capture, which "could not operate a Change of Property; And a Re-"Capture ſhould not relate by Fiction (like the *Roman* "*Jus Poſtliminii*) as if the Capture had never happened, "*unleſs* the Loſs was in Truth recovered."

This Reaſoning proved, *è converſo*, That if the Thing *in Truth was ſafe*, no artificial Reaſoning ſhall be allowed to ſet up a total Loſs.

The *Words* quoted at the Bar were certainly uſed, "That "there is no Book, ancient or modern, which does not "ſay *That in Caſe of the Ship being taken, the Inſured may* "*demand for a total Loſs, and abandon.*" But the Propoſition was *applied* to the Subject Matter; and is certainly true, provided the Capture, or the total Loſs occaſioned thereby, *continue to the Time of abandoning and bringing the Action.*

The Caſe then before the Court did not make it neceſſary to *ſpecify all the Reſtrictions.* But I will read to You, *verbatim*, from my Notes of the Judgment then delivered, what was ſaid; to prevent any Inference being drawn, beyond the Caſe then determined. I ſaid—

P. 1213. "† In Queſtions upon Policies, the Nature of the Con-
†*V. ante* 697. "tract, as an Indemnity and Nothing elſe, is always liber-
"ally conſidered. There may be Circumſtances, under
"which a Capture would be but a *ſmall* temporary Hinder-
"ance to the Voyage, perhaps *none* at all: As if a Ship was
"taken, and *in a few Days eſcaped entirely*, and purſued her
"Voyage. There are Circumſtances, under which it would
"be deemed an *Average*-Loſs: As if a Ship ſhould be taken,
‡*V. ante* 697. "and afterwards *ranſomed*" And in ‡ another Part, I ſaid—
"I know in later Times, the Privilege of abandoning has
"been reſtrained. But there is no Danger in the preſent
"Caſe: The Loſs was total at the Time it happened; It
"continued total, as to the Deſtruction of the Voyage; A
"Moiety muſt be paid for Salvage, beſides other great Coſts
"and Expences; What could be ſaved of the Goods might
"not be worth the Freight, for ſo much of the Voyage as
"they had gone when they were taken; The Cargo, from
"its periſhable Nature, muſt have been ſold or thrown
"away where it was brought in; The Ship, in ſo ſhatter-
"ed a Condition as might make it only worth the Materi-
"als to be ſold."—And more to the ſame Effect.

From this Way of Reaſoning, it did by no Means follow That if the Ship and Cargo had, by the Re-capture, been brought ſafe to the Port of Delivery, *without having ſuſtained any Damage at all*, that the Inſured might abandon.

But, without dwelling longer upon Principles or Authorities, The CONSEQUENCES of the preſent Queſtion are deciſive. It is impoſſible that any Man ſhould *deſire* to abandon in a Caſe circumſtanced like the preſent, but for One of two Reaſons; *viz.* Either becauſe he has *over-valued*; Or becauſe the *Market has fallen* below the Original Price. The only Reaſons which can make it the Intereſt of the Party *to deſire* are concluſive *againſt allowing* it.

It is unjuſt to turn the *Fall* of the Market upon the Inſurer; who has no Concern in it, and who could never gain by the Riſe. And an *Over-valuation* is contrary to the general Policy of the Marine Law; contrary to the Spirit of the Act of 19 *G.* 2; a Temptation to Fraud; and a Source of great Abuſe: Therefore no Man ſhould be allowed to avail himſelf of having *over*-valued.

If the Valuation be true, the Plaintiff is indemnified by being paid the Charge he has been put to by the Capture. If He has over-valued, he will be a *Gainer* if he is permitted to abandon: And he can only deſire it, *becauſe* he has over-valued. This was avowed upon the firſt Argument: And that very Reaſon is concluſive againſt its being allowed.

The

* The *Insurer*, by the Marine Law, ought never to *pay leſs*, upon a Contract of Indemnity, than the *Value of the Loſs*: And the *Inſured* ought never to *gain more*. Therefore if there was Occaſion to reſort to that Argument, the *Conſequence* of the Determination would alone be ſufficient upon the preſent Occaſion. * P. 1214.

But, upon *Principles*, this Action could not be maintained as for a *total* Loſs, if the Queſtion was to be judged by the ſtricteſt Rules of *Common* Law: Much leſs can it be ſupported for a *total* Loſs, as the Queſtion ought to be decided, by the large Principles of the *Marine* Law, according to the ſubſtantial Intent of the Contract and the real Truth of the Fact.

The daily Negociations and Property of Merchants ought not to depend upon *Subtleties* and *Niceties*; but upon Rules, eaſily learned and eaſily retained, becauſe they are the Dictates of Common Senſe, drawn from the Truth of the Caſe.

If the Queſtion is to depend upon the *Fact*, every Man can judge of the Nature of the Loſs, before the Money is paid: But if it is to depend upon *ſpeculative Refinements*, from the Law of Nations or the *Roman Jus Poſtliminii* concerning the Change or Re-veſting of Property; no Wonder *Merchants* are in the dark, when *Doctors* have differed upon the Subject, from the Beginning, and are not yet agreed.

To obviate too large an Inference being drawn from this Determination; I deſire it may be underſtood, that the Point here determined is, "*That the Plaintiff, upon a Poli-*
"*cy, can only recover an Indemnity according to the Nature of his*
"*Caſe at the Time of the* ACTION BROUGHT, *or (at moſt)*
"*at the Time of his* OFFER TO ABANDON."

We give no Opinion, how it would be, in Caſe the Ship or Goods, be reſtored in Safety, BETWEEN *the Offer to abandon*, and the *Action* brought; or BETWEEN *the Commencement* of the Action, and the *Verdict*. And particularly I deſire, that no Inference may be drawn, "that in
"Caſe the Ship or Goods ſhould be reſtored *after the Money*
"*paid as for a total Loſs*, the Inſurer could compel the In-
"ſured to *refund* the Money and take the Ship or Goods:"
That Caſe is totally different from the preſent, and depends, throughout, upon different Reaſons and Principles.

Here the Event had fixed the Loſs to be an Average only, *before* the Action brought; *before* the Offer to abandon; and *before* the Plaintiff had Notice of any Accident; Conſequently *before* He could make an Election.

Therefore,

P. 1213. "† In Queſtions upon Policies, the Nature of the Con-
†*V. ante* 697. "tract, as an Indemnity and Nothing elſe, is always liber-
"ally conſidered. There may be Circumſtances, under
"which a Capture would be but a *ſmall* temporary Hinder-
"ance to the Voyage, perhaps *none* at all: As if a Ship was
"taken, and *in a few Days eſcaped entirely*, and purſued her
"Voyage. There are Circumſtances, under which it would
"be deemed an *Average*-Loſs: As if a Ship ſhould be taken,
‡*V. ante* 697. "and afterwards *ranſomed*" And in ‡ another Part, I ſaid—
"I know in later Times, the Privilege of abandoning has
"been reſtrained. But there is no Danger in the preſent
"Caſe: The Loſs was total at the Time it happened; It
"continued total, as to the Deſtruction of the Voyage; A
"Moiety muſt be paid for Salvage, beſides other great Coſts
"and Expences; What could be ſaved of the Goods might
"not be worth the Freight, for ſo much of the Voyage as
"they had gone when they were taken; The Cargo, from
"its periſhable Nature, muſt have been ſold or thrown
"away where it was brought in; The Ship, in ſo ſhatter-
"ed a Condition as might make it only worth the Materi-
"als to be ſold."—And more to the ſame Effect.

From this Way of Reaſoning, it did by no Means follow That if the Ship and Cargo had, by the Re-capture, been brought ſafe to the Port of Delivery, *without having ſuſtained any Damage at all*, that the Inſured might abandon.

But, without dwelling longer upon Principles or Authorities, The CONSEQUENCES of the preſent Queſtion are deciſive. It is impoſſible that any Man ſhould *deſire* to abandon in a Caſe circumſtanced like the preſent, but for One of two Reaſons; *viz.* Either becauſe he has *over-valued*; Or becauſe the *Market has fallen* below the Original Price. The only Reaſons which can make it the Intereſt of the Party *to deſire* are concluſive *againſt allowing* it.

It is unjuſt to turn the *Fall* of the Market upon the Inſurer; who has no Concern in it, and who could never gain by the Riſe. And an *Over-valuation* is contrary to the general Policy of the Marine Law; contrary to the Spirit of the Act of 19 *G.* 2; a Temptation to Fraud; and a Source of great Abuſe: Therefore no Man ſhould be allowed to avail himſelf of having *over*-valued.

If the Valuation be true, the Plaintiff is indemnified by being paid the Charge he has been put to by the Capture. If He has over-valued, he will be a *Gainer* if he is permitted to abandon: And he can only deſire it, *becauſe* he has over-valued. This was avowed upon the firſt Argument: And that very Reaſon is concluſive againſt its being allowed.

The

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Here the Event had fixed the Loſs to be an Average only, *before* the Action brought; *before* the Offer to abandon; and *before* the Plaintiff had Notice of any Accident; Conſequently *before* He could make an Election.

Therefore,

*P. 1215. * Therefore, under theſe Circumſtances, We are of Opinion "That He can not recover for a total, but for an "AVERAGE *Loſs only*;" the Quantity of which is eſtimated and aſcertained by the Jury.

The JUDGMENT muſt be entered up as for the *Average Loſs* ſtated in the Caſe.

Rex *verſ.* Perrott.

‡ *V. ante* 1112, 1125. (*Tueſday* 10th *February* 1761.)

THIS Man having, ‡ſince the laſt Motion, ſubmitted to be re-examined by the Commiſſioners, upon the former Queſtion; and having been remanded by them, petitioned the Lord Keeper to be diſcharged; annexing a Copy of his Depoſition, giving an Account of the Manner in which he had diſpoſed of 1503*l.* in 16 general Articles, one of which, was—"Expences attending the Con-"nection I had with the Fair Sex 550*l.*" But the Lord Keeper rejected his Petition.

He afterwards ſubmitted to a further Examination by the Commiſſioners, Who thereupon met on 21ſt *March* 1761; And being ſtill diſſatisfied with his Anſwer, remanded Him to *Newgate*: From whence he was, at his own Inſtance, now brought up again by *Habeas Corpus*. It appeared, that at this laſt Meeting, The ſame Queſtion had been again propoſed to him. In Anſwer to which, He particularized a Woman upon whom he had ſpent 500*l.* (from *December* 1758 to *December* in the Year 1759;) and alſo particularized the Times of ſending and giving it to Her; but that No other Perſon was privy to this; and that the Woman (whoſe Name was *Sarah Powell*, otherwiſe *Taylor*,) is dead, as he has heard. That She knew him to be a Bankrupt, and never returned the Money or any Part of it to him; And that he gave it to Her for her Maintenance and Expences, and not for a Fund for her future Support, or wherefrom He could draw any Advantage. That he knew, in the Year 1759, when He gave and remitted theſe Sums to Her, "That he was not worth any Thing, and that He "was remitting to Her the Money of his Creditors." That He was acquainted with Her 5 or 6 Years; but he cannot recollect what he gave Her or ſpent upon Her, during the 2d, 3d or 4th Years of their Acquaintance; nor did He keep any particular Account or Memorandum thereof, either in thoſe Years or in the Year 1759; but ſpeaks from Memory only. That He did not take any of this Money from his Banker; but always took it from Mr. *Thompſon*, (ſince deceaſed) who uſed to ſell Goods for him. That all Letters between him (the Bankrupt) and this Woman, (except One or Two,) are burnt or deſtroyed.

Mr.

* Mr. *Gould*, Mr. Serj. *Davy*, Mr. *Coxe*, and Mr. *Stowe* argued that he ought now to be diſcharged, as having given a *full and complete* Anſwer to the Queſtions propounded to him: And it is not material, in the preſent Reſpect, whether it be true or falſe; or whether his Conduct was prudent or imprudent. If he be not now diſcharged, He muſt be impriſoned for Life. * P. 1216.

Mr. Serj. *Hewitt*, and Mr. *Norton*, *contra*, inſiſted that this Anſwer was ſtill *incomplete and unſatisfactory*; and that the Defendant can not be indicted for Perjury upon it. He was bound down by what was already proved upon him and traced to him, to account for a very great Sum of Money which appeared to have come to his Hands in this *particular* Year: And this is by no Means a ſatisfactory Account of the Diſpoſition of it, nor at all probable in itſelf. He lets the Commiſſioners into no Sort of Light whereby to trace this Money, or to diſcover what is become of it: It is not to be imagined or conceived that 4, 5, 6, or 7 hundred Pounds in a Month could be paid her for Maintenance and Expences only; eſpecially as it appears (as it does by what He himſelf has repreſented in one Part of his Examination) that She had only a Man-Servant and two Maids, whilſt She was at *Bath*. It might have been repaid to him, or to ſome One in Truſt for him; or laid out in Stocks, and thoſe Stocks transferred in Truſt for him.

The COURT held his Anſwer to be incomplete and unſatisfactory; and ORDERED Him to be REMANDED.*

* This Man was afterwards convicted and executed for concealing his Effects.

Edie and Another *verſ.* Eaſt-India Company.

THIS was an Action, brought by the Indorſees, upon two *foreign Bills of Exchange* drawn by Colonel *Clive*, then in the *Eaſt-Indies*, upon the *Eaſt-India* Company, and accepted by them, payable to Mr. *Campbell* or Order, then alſo in *India*, and indorſed by Mr. *Campbell* to Mr. *Robert Ogilby*. One of theſe Bills was by ſuch Indorſement directed to be paid to *Robert Ogilby or Order*, in the uſual Way of Indorſing; And no Diſpute or Queſtion aroſe upon it. The other Bill was alſo indorſed by Mr. *Campbell* to *Robert Ogilby*: but the Words "*or Order*" were originally OMITTED in *this Indorſement*; and afterwards put in, by another Hand, before the Trial.

Theſe Bills *thus* indorſed by Mr. *Campbell* to Mr. *Ogilby*, (without adding the Words "or Order," in the Indorſement of the latter,) were by Him indorſed to the Plaintiffs *Edie* and *Lard* or Order.

Ogilby

* P. 1217. * *Ogilby* became inſolvent: And the Queſtion then was —WHO was to *bear the Loſs*; Whether Mr. *Campbell*, or the Plaintiffs: (For the *Eaſt-India* Company were no more than Stake-Holders)

The Diſpute aroſe only upon this latter Bill: For the firſt Bill was given up at the Trial, by the Counſel for the Defendants; and a Verdict was taken for the Plaintiff, upon *that* Count. But

On the ſecond, An Objection was taken to the *Want* of the Words "*or Order*;" Which the Defendant's Counſel inſiſted were neceſſary to be *originally* inſerted by the Indorſer; And that the OMISSION of them was equivalent to the moſt *reſtrictive* Words that He could have made Uſe of in Order to limit the Payment. And accordingly, on this *ſecond* Count, a Verdict was found for the Defendant.

Mr. *Morton*, of Counſel for the Plaintiffs, having moved for a new Trial, Mr. *Norton* and Mr. *Wedderburn* now ſhewed Cauſe, on Behalf of the Defendants, Why a New Trial ſhould not be granted.

In Support of the Motion, Mr. *Morton* and Mr. *Yates* had cited the 3 following Caſes; *viz.* * *More* v. *Manning*, *Comyns* 311, in Point: where it was holden "That a Promiſſory "Note to pay to One or Order is aſſignable *toties quoties* by "the Indorſee or Indorſees, though the Words *or Order* be "omitted in the Indorſement."

* In *C. B. Hil.* 6 *G.* 1.

† In *B. R. Trin.* 1723. † *Acheſon* v. *Fountain*, 1 *Strange* 557. in Point alſo; It being there holden "That an indorſable Note indorſed to "*A. B. without* ſaying *or Order*, is an Indorſement to the "Indorſee or Order: For the *Law* interprets the Aſſignments to be in the *ſame* Manner as the Note is drawn."

And *Evans* v. *Cramlington*, in *Carthew* 5. and 2 *Ventris* 309, 310. which was ſaid to be applicable to the preſent Caſe.

They alledged that every Indorſement imports that the *Value has been received* by the Indorſer: And

A Promiſſory Note or Bill of Exchange, originally made payable to One or Order, is *in its own Name aſſignable*; And the Aſſignee has the *whole Intereſt* in it, and may aſſign it as He pleaſes; And any *Reſtriction or Confinement* of his Aſſignment of it is *contrary to the Nature of the Thing*, and therefore void.

An Indorſement is an Aſſignment; and, for the Reaſons aforeſaid, is not reſtrainable by the Omiſſion of Words, or even

* even by Negative Words: And if it be given in Blank, it may be filled up by the Indorſee or by any One elſe, even in the Face of the Court, *at the Trial.* ‡ * P. 1218. ‡ See *Comyns* 312. *accord*. *V. Poſt.*

Having thus eſtabliſhed this Principle, "That the Bill "of Exchange being *originally made aſſignable and negotia-* "*ble*, and being *in its own Nature aſſignable* muſt continue "*always* ſo; And that the Law will interpret the Aſſign- "ment to be made in the *ſame* Manner in which the Bill is "drawn, although the Words *or Order* be *omitted*;"

They grounded their Motion for a New Trial upon theſe two Foundations;

1ſt. That the Jury have found directly contrary to this ſettled Law, and have founded their Verdict upon the CUSTOM OF MERCHANTS, which they ſuppoſe to be quite to the contrary; and of which Cuſtom of Merchants, *Evidence* was permitted to be given at the Trial; which *Evidence* ſhould not have been allowed. For the Cuſtom of Merchants is Part of the Law of *England*; And the Law of *England* being already fully ſettled on this Point, no Evidence in *Contradiction* to it ought to have been *admitted*; nor can any Finding of a Jury *alter* it.

2dly. That *if* the Counſel for the Plaintiff had *apprehended* that ſuch Sort of Evidence would have been gone into at the Trial, they could and would have produced better and fuller Evidence than they did, to prove that the Cuſtom of Merchants was really and in Truth and Fact *agreeable* to the Law as ſettled: And they alledged That *no Fact* of Uſage was proved at the Trial, to ſupport a Notion, "That the Acceptor was not liable upon ſuch an "Indorſement."

Mr. *Norton* and Mr. *Wedderburn*, *contra* for the Defendants, inſiſted, that the preſent Verdict was right, and ought to ſtand.

It has been urged, 1ſt, "That this Bill is *in its Nature* "*negotiable*;" and 2dly, That being ſo, it can not be *re-* "*ſtrained* by this or any other Indorſement."

As to the firſt—They agreed a Bill of Exchange to be negotiable in its *Nature*. But it does not follow, they ſaid, that becauſe it was *once* ſo, it muſt therefore *always continue* ſo. For the Payee has the *abſolute* Property in it; He is the Purchaſer of it: And why ſhould not He *limit* the Payment of it as he pleaſes? No Man can be *injured* by this; No Man can be *deceived* by it; It cannot be attended with the leaſt Inconvenience.

No

* P. 1219. * No Case can be cited to the contrary. The Cases that have been cited do not apply to it; as will appear presently.

An *imperfect* Indorsement, an Indorsement in Blank, indeed may be supplied: But the Owner *may*, if he thinks proper, indorse it *negatively* and *upon Terms*; and then the Indorsee *takes* it upon those Terms, and *under* that Restriction, which the Indorser has expressly imposed upon it.

This is no more than a naked Authority to receive the Money.

It is not true, "That *every* Indorsement *imports* Value "received by the Indorser." For an Indorsement may be so worded as to shew that the Interest *remains* in the Indorser: As for Instance, "Pay this Bill to *my Steward*, "and *to no other* Person; Or "Pay to such a One *for* "*my Use*, and to no other Person whatsoever."

And whether he has or has not so limited it, is a Question of *Fact*, not of Law: And it depends upon the *Custom of Merchants*.

The Case of *Moore* v. *Manning* does not contradict our Principle. It does not appear that that was not an Indorsement in *Blank*; which (it is agreed) does not destroy its Negotiability. The Assignment was there treated as an *absolute* Assignment to *Witherhead*. It must have been an Indorsement in *Blank*; and the Case goes upon that Supposition. However, that came before the Court upon *Demurrer*.

The Case of *Acheson* v. *Fountain* was only a Question "Whether the Plaintiff's Evidence *supported her Declara-* "*tion?*" But her Demand was full and clear, *without* those Words. The Case could not require the Reasons there given: Therefore they are at least extrajudicial, or * perhaps added by the Reporter.

* The Court expressed themselves to the Effect there reported. My own Note of that Case agrees with Sir *John Strange's*.

‡ I can't see that it is. As to *Evans* v. *Cramlington*—'Tis nothing like this‡ Case; nor is any Inference to be drawn from it.

Besides, All these Cases are only upon *Promissory Notes*; which depend upon our municipal Laws: And Promissory Notes are, by the Stat of 3, 4 *Ann. c.* 9. put upon the same Foot with *Inland* Bills of Exchange.

But *Foreign* Bills of Exchange stand upon quite another § *V. Wood's Inst.* 283. Foot; § namely, upon the general Law and Custom of Merchants. And the Verdict supposes and proves the Custom of Merchants to be with the Defendants: And the

* the Evidence of ſeveral eminent Merchants and experienced Perſons at the Trial, was agreeable to the Finding. And if they *could* have encountered it; Why did they not? Their omitting to do ſo, is ſurely no Ground for a new Trial. * P. 1220.

Mr. *Morton* and Mr. *Yates*, in Reply—

They admit the Queſtion to be, "What is the true "Conſtruction of ſuch a reſtrained Indorſement as this is." And certainly this Sort of Indorſement makes or rather continues a Bill of Exchange generally negotiable. Meſſieurs *Edie* and *Lard* are in the Caſe of every common Indorſee.

The Caſes that We have cited are plain and clear, on our Side: On the other Side, They ſuppoſe imaginary Circumſtances, which did not really exiſt in them.

The Determinations upon Promiſſory Notes prove, "That the Law was likewiſe ſo, upon Foreign Bills of "Exchange."

The *Fact* of Uſage that would have been cogent and binding, if proved, ſhould have been a *Refuſal* to negotiate a Bill with ſuch a limited and reſtrained Indorſement.

If this Bill was to go back to *India*, proteſted by Meſſieurs *Edie* and *Lard* for Non-Payment by the Company and the Indorſers, undoubtedly the Drawer would be liable to Mr. *Edie* and Mr. *Lard* for Payment of it.

Lord MANSFIELD—I thought, at the Trial, that the Defendants *might* be at Liberty to go into the *Uſage of Merchants* upon this Occaſion.

And Mr. *Race*, Caſhier of the Bank of *England*, gave Evidence, "That the Bank, if they ever diſcounted the "Bills not indorſed to Order, did it *only* upon the *Credit* "*of the Indorſer*; but that otherwiſe they would not take "them, *not* conſidering them as being negotiable."

Mr. *Simon*, a very eminent and experienced Merchant, depoſed, That He conſidered the Omiſſion of theſe Words as *reſtrictive* of the Indorſementto the particular individual Perſon ſpecified in the Indorſement: And He added, That it was, in his Opinion, merely in the Nature of a *perſonal Authority* "to receive the Money;" and was not negotiable.

So Mr. *Grant*, another Witneſs on the Part of the Defendants, declared his Opinion alſo to be.

So

* P. 1221. * So alſo Mr. *Regnier* their fourth and laſt Witneſs.

Theſe were the four Witneſſes for the Defendants.

The Plaintiffs, on their Part, called Mr. *Richard Cope* (Partner with Mr. *Honywood* the Banker:) But they were miſtaken in Him; For he agreed with the other four Witneſſes, exactly.

Another Witneſs called by the Plaintiffs was Mr. *Udney:* Who thought it ſufficient without the Words "or Order," and atteſted that He had himſelf *diſcounted* One, and ſaid He had *paid*, He believed, 50 Bills where the Words "or Order" were omitted in the Indorſement.

Mr. *Macbean*, a Notary Public, alſo in his Opinion held the Indorſement of a Bill of Exchange to be negotiable, notwithſtanding the Omiſſion of theſe Words; and that no Objection of this Sort was ever made. Indeed if the Bill ſhould be indorſed "Pay the Contents to *A. B.* "*only*;" It was looked upon, He ſaid, to be a Reſtriction of the Payment to *A. B.* perſonally.

Mr. *Undy* and Mr. *Anderſon* depoſed to the ſame Effect, "That the Omiſſion of the Words *or Order* did *not* pre-"vent the Negotiability."

But the Plaintiffs did not, however, come prepared with *particular* Witneſſes to the *Uſage* in ſuch Caſes; not expecting that the Evidence in Support of ſuch a Uſage would have been admitted.

I told the Jury, that by the *general* Law, (laying the *Uſage* out of the Caſe,) the Indorſement would *follow the Nature of the Original Bill*, and be an *abſolute* Aſſignment to the Indorſee or his Order.

And after having told them that this was the *general* Law, then I left it to them upon the *particular Evidence* of the Usage, that had been laid before them; And recommended it to them to conſider well of this Evidence; and told them, that if they found an Usage ſo *eſtabliſhed and ſettled* amongſt Merchants and Traders as to be *clear* and *plain* and *beyond Doubt*, they might find a Verdict for the Defendants upon that ſecond Bill: But I directed them that if they were *doubtful of the Uſage*, or if the Uſage appeared to them *not to be fully and clearly eſtabliſhed*, or to be the *other* Way, then they ought to find for the Plaintiffs.

I told them, that the Queſtion aroſe upon the Inſolvency of *Ogilby*, the firſt Indorſee; And that it ought to be conſidered

* conſidered by them *Who* it was that *gave the Truſt to Ogilby*: For He that gives the Truſt, ought to run the Riſque of his Credit. * P. 1222.

I obſerved that this Indorſement was made by Mr. *Campbell*, the Payee, to this *Ogilby*: And if *He* meant to truſt *Ogilby*, it was but reaſonable that He ſhould be the Perſon to ſuffer by *Ogilby*. And it was clear that He meant to truſt *Ogilby* with the Money: For it is acknowledged on all Hands, that *Ogilby* Himſelf had a Right to receive it of the Company; whether he had a Right to indorſe the Bill to another Perſon, or not.

The Jury ſtaid out a conſiderable Time; and then brought in a Verdict for the Plaintiffs, upon the Bill indorſed to *Ogilby or Order* (which was not diſputed:) But they gave their verdict for the *Defendants*, upon that Count which declared upon the ſecond Bill (for 2000l.) which was indorſed to Him WITHOUT adding the Words "*or* "*Order.*"

In the whole Courſe of the Evidence, *No one Fact* was proved, where the Indorſee to whom a Bill was indorſed, without adding the Words "or Order," *ever actually* LOST *the Money*; ſo as to put Him upon *diſputing* the Point.

Since the Trial, I have looked into the Caſes, and have conſidered the Thing with a great deal of Care and Attention, and thought much about it: And I am very clearly of Opinion, that I *ought not* to have admitted any Evidence of the particular *Uſage* of Merchants in ſuch Caſe. Of this, I ſay, I am now ſatisfied: For the *Law* is already SETTLED.

I lay the Caſe of *Evans* v. *Cramlington* out of the Way; as I do not ſee that it is much applicable to the Caſe now before Us.

But I go upon the two Caſes of *More* v. *Manning*, and *Acheſon* v. *Fountain*. The former was an *Aſſumpſit* upon a Promiſſory Note given by *Manning* to *Statham* or Order: *Statham* aſſigned it to *Witherhead*; and *Witherhead* to the Plaintiff. Upon a Demurrer to the Declaration, Exception was taken, "Becauſe the Aſſignment was made to *Wi-* "*therhead without* ſaying to Him *and Order*; and then He "*can not aſſign it over.*" But it was reſoved by the whole Court, That it was *good*: For *if* the *Original* Bill was aſſignable, then, to whomſoever it is aſſigned, He has *all* the Intereſt in the Bill, and may aſſign it as he pleaſes And very right that was: For the main Foundation is, "What "the Bill is in its *Origin.*" And accordingly, as that Note was *originally* made payable to *Statham and Order*, they held the Aſſignment of it to *Witherhead* to be an *abſolute* Aſſignment to him, which comprehended his Aſſigns. It *could*

not

* P. 1223. * *not* be an Indorſement *in Blank*; becauſe it is ſtated "That the Aſſignment was made *to Witherhead*, without "ſaying to Him or Order." The Point reſolved was, "That the Aſſignment *to Witherhead* was *abſolute*." The Words added at the End of the Report are inaccurate, and might, at firſt View, occaſion a little Confuſion: But, to be ſure, the Court went into an additional Argument; which the Reporter has omitted to particularize. But the Declaration *ſets out* the Aſſignment; which is "An Aſ-"ſignment by *Statham to Witherhead*, omitting to add the "Words *and Order*."

Then as to the other Caſe of *Acheſon* v. *Fountain*—The Plaintiff had declared upon an Indorſement made by *William Abercrombie*, whereby He appointed the Payment to be "to *Louiſa Acheſon or Order:*" Upon producing the Bill in Evidence, which appeared to be originally made payable to *Abercrombie or Order*, yet *Abercrombie*'s Indorſement was only this—"Pray pay the Contents to *Louiſa Acheſon:*" It was objected, "That the Indorſement did *not agree* with the "Declaration." The Court, notwithſtanding this, gave Judgment, upon the ground of a *General Propoſition* in Law, "That a Bill is negotiable, *without* adding thoſe Words to "the Indorſement." And though the Plaintiff *might* perhaps have had Leave to amend his Declaration in the Point objected to, yet the Declaration came before the Court *unamended*, ſo that the Objection came with its full Strength: And the Court gave their Opinion upon the Point, as Matter of *clear ſettled Law*; For the whole Court were of Opinion, "that it was well enough, *that* being the *legal Import* "of the Indorſement; and that the Plaintiff *might*, *upon* "*this*, *have indorſed it over to another*, who would be the "*proper Order* of the *firſt* Indorſer." And accordingly, Judgment was given for the Plaintiff.

A Draught drawn upon One Perſon, directing him "to "pay Money to another *or Order*," is, in its *Original Creation*, *not an Authority*, but a *Bill of Exchange*, and is negotiable. It belongs to the Payee, to do what he thinks proper with it, and to uſe it as beſt ſuits his Convenience. It is his *Property*; And He may aſſign it *as ſuch*, and to whom He pleaſes: And his Direction "to pay it *to ſuch a One*," is a Direction "to pay it to Him *or his Order*;" For He aſſigns his *whole* Property in it, and has had a *valuable Conſideration* for ſo doing.

Another Thing obſervable is the Abſurdity of the Opinion of the Merchants (which they avowed to be their Opinion) "That a Bill thus indorſed was *not* to go to Exe-"cutors or Adminiſtrators, in Caſe of the Indorſee's "Death;" Whereas there can be no Doubt, that ſuch an Intereſt is *tranſmiſſible* to Executors or Adminiſtrators.

The

* The Words "*or Order*" are not neceſſary to be *inſerted in the Indorſement*, any more than the Words "*Executors or* "*Adminiſtrators*" are neceſſary to be added to it. * P. 1224.

The Point now in Queſtion has been already *ſolemnly ſettled* both in the Court of King's Bench and Common Pleas, by the two Adjudications that have been mentioned: And therefore Witneſſes ought *not* to have been examined to the *Uſage*, after ſuch ſolemn Determinations of what was the Law.

Therefore there ought to be a New Trial.

As to the Coſts—I think there ſhould be None, in this Caſe. For the Verdict muſt be ſet aſide *generally*, not in part only. Yet this Verdict is agreed to be right upon the *firſt* Count; and that is found for the *Plaintiffs*. Therefore there ought to be no Coſts upon granting a new Trial in the preſent Caſe: Since the Merits were *always* clear for the Plaintiffs, on the *firſt* Count; And it *now* appears that Nothing remained to be tried, on the *Second*.

Mr. Juſtice DENISON concurred, *in toto*.

This Verdict upon the ſecond Count is not well founded. The Point in Queſtion is not Matter of *Fact*; but Matter of *Law*.

I never before heard of this Notion of a *reſtrictive* Aſſignment of a *negotiable* Bill.

Where a Bill is originally made payable to *A.* or Order, it is of Courſe and in its very Eſſence negotiable from hand to hand. An inland Bill of Exchange is aſſignable in its Nature, *toties quoties*: And Promiſſory Notes are now put upon the ſame Foot with them. Foreign Bills of Exchange are equally ſo, by the Law of Merchants, and by the ſettled Determinations of Courts of Law in *England*.

This is a Matter of *Law*: And the Law is clearly and fully fixed. There is no Inſtance of a *reſtrictive Limitation*, where a Bill is *originally* made payable to a Man or *Order*.

I never heard of an Indorſement to *A. only*. In general, the Indorſement follows the Nature of the Thing indorſed; and is equally negotiable.

But at leaſt, *here* is no ſuch Reſtraint as *that*: Here is Nothing from whence to collect an *Intent* to limit and reſtrain it.

* P. 1225. * it. The Law has determined that the Bill is negotiable in itſelf: And there is no Law to the Contrary, or any Pretence for it in the preſent Caſe. And it would be infinitely inconvenient, if it ſhould be otherwiſe: For, as no Circumſtances at all appear, it would deſtroy or diſturb that *Certainty* which Tranſactions of this Nature require.

An *Executor* or *Adminiſtrator* may indorſe a Bill or Promiſſory Note, within the Cuſtom of Merchants. In the Caſe of *Rawlinſon* v. *Stone*, *M.* 20 *G* 2 *B R.* upon a Writ of Error from *C. B.* An Inland * Bill of Exchange was made payable to *A.* or Order: *A* died, and the Adminiſtrator of *A.* aſſigned the Note to the Plaintiff in the Common Pleas; for whom that Court gave Judgment upon Demurrer. The Court, upon Argument of the Writ of Error here, held, "that the *Executor or Adminiſtrator might* aſſign it over." And they affirmed the Judgment of the Court of Common Pleas. The Executor or Adminiſtrator is only Aſſignee in *Law*, not in Fact: Yet they held that he might aſſign it by the *Name* of Executor or Adminiſtrator; and that it was the common Method to do ſo. The Indorſement virtually included it.

* I find by my own Notes, that it was a Promiſſory Note. And there is a very ſhort Account of it (which agrees with mine) in 2 *Strange* 1260. by the Name of *Robinſon* v. *Stone*. However, 'tis immaterial whether it was on *Note* or *Bill*.

Now the preſent Caſe includes that, and more: For here, the firſt Indorſee was an Aſſignee in *Fact*. And it ought to be ſo, for the Sake of Certainty, and for the Benefit and Convenience of Trade. No Intention appears here to reſtrain it: And in general, the *Law* ſays "it is aſſignable."

And it is not material, when or how filled up: For it is every Day's Practice, to fill up the Indorſement long after it is made; nay, even in Court, at the Trial.

I will not give any Opinion, whether the Indorſer MIGHT have limited his Aſſignment by ſome clear plain negative Words, if in Fact it had been his Intention to limit and reſtrain it.

HERE, no ſuch Intention appears: The Indorſement is *general*; And the Law is ſettled, "That the Aſſignment "follows the Nature of the Thing aſſigned." And the Law being already ſo ſettled, the Jury ought not to have given their Verdict upon any Opinion contrary to it.

A New Trial ought therefore to be granted: But No Coſts ſhould be paid; for the Reaſons already mentioned.

Mr. Juſt. FOSTER concurred that there ſhould be a New Trial; becauſe it is a Verdict againſt a known and ſettled Rule of Law; as appears by the two adjudged Caſes reported in *Comyns* and *Strange*. Therefore it ought not to have been left to a Jury at all.

Much

* Much has been ſaid about the *Cuſtom of Merchants*. But the *Cuſtom of Merchants*, or Law of Merchants, is the Law of the Kingdom; and is *Part of the Common Law*. * P. 1226.

People do not ſufficiently diſtinguiſh between Cuſtoms of different Sorts. The true Diſtinction is between *general* Cuſtoms, (which are *part* of the Common Law,) and *local* Cuſtoms (which are not ſo.) This Cuſtom of Merchants is the *general* Law of the Kingdom, part of the Common Law; and therefore *ought not* to have been left to the Jury, *after* it has been already ſettled by judicial Determinations.

But there ſhould be *no Coſts* paid upon this Occaſion; becauſe the Verdict is both againſt Law and againſt the Opinion and Direction of my Ld. Ch. Juſtice, upon the ſecond Count; and is with the Plaintiffs, on the firſt.

Mr. Juſt. WILMOT was of the ſame Opinion.

The *Law*, with regard to this Point, is *ſettled* and fully *eſtabliſhed*, by the two Caſes which have been cited; and upon right and proper Principles.

This original Contract is, "to pay to ſuch Perſon or "Perſons, as the Payee or his Aſſignees or their Aſſignees "ſhall direct:" And there is as much Privity between the laſt Indorſer and the laſt Aſſignee, as between the Drawer and the firſt Payee. When the Payee aſſigns it over, He does it by the Law of Merchants; being a Choſe in Action, not aſſignable by the general Law. And the Indorſement is *part* of the Original Contract, and is *incidental and appurtenant* to it in the Nature of it; and muſt be underſtood and interpreted to be made in the *ſame Manner* as the Bill was drawn: And the Indorſee holds it in the ſame Manner, and with the ſame Privileges, Qualities and Advantages, as the Original Payee held it; that is, as an aſſignable negotiable Note, which He may indorſe over to Another, and that Other to a third, and ſo on, at Pleaſure.

There is a great deal of Difference between giving a naked Authority "to receive it," and transferring it over *by Indorſement*. And I doubt Whether He *can* limit his Indorſement of it by Way of Aſſignment or Transfer to Another, ſo as to *preclude* his Aſſignee from aſſigning it over as a Thing negotiable. For the Aſſignee purchaſes it for a *valuable Conſideration*; and therefore purchaſes it with all its Privileges, Qualities and Advantages; One of which, is its Negotiability.

* P. 1227. * To be ſure, He *may give* a mere *naked Authority* to a Perſon "to receive it *for Him:*" He may write upon it—"Pray pay the Money to my Servant for my Uſe;" or uſe ſuch Expreſſions as neceſſarily import that he does *not mean* to indorſe it *over*, but is only authoriſing a particular Perſon to receive it *for Him* and for his *own Uſe*. In ſuch Caſe, it would be clear that *no* valuable Conſideration had been paid Him. But, at leaſt, that Intention muſt *appear upon the Face of the Indorſement*. Whereas here, *no* ſuch Thing nor any Thing tending to it, appears upon the Face of the Indorſement: It is a *general Aſſignment* without any Reſtriction at all.

The Principle I rely upon, is the *Paying a valuable Conſideration* for the Aſſignment.

In the Caſe of *More* v. *Manning*, (*which is in Point,*)
* *V. Comyns* 312. Thoſe * Words added at the End, "That at a Trial, when a "Bill is given in Evidence, the Party may fill up the Blank "as He pleaſes"—are Redundancy. And that Indorſement could not be an Indorſement in *Blank:* It appears otherwiſe from the Caſe itſelf. It was made *to Witherhead*, but without ſaying "to Him and Order."

So the other Caſe reported in 1 *Strange* 557. is likewiſe in Point. And there is no Difference, Whether the Determinations be on Promiſſory Notes, or on Bills of Exchange: It is juſt the ſame Thing; becauſe it is to be governed by the ſame Rule.

[He cited a Manuſcript Report of that ſame Caſe of *Acheſon* v. *Fountain*, which is reported by Sir *John Strange:* Which agreed with Sir *John*'s Report of it, and with mine exactly.]

There is another Caſe in *Carthew* 403, *Fiſher* v. *Pomfrett*, that ſhews this to be a right Determination; (though the State of that Caſe was indeed juſt the Reverſe of the preſent Caſe.) It was a Bill of Exchange payable to *T. S.* who indorſed it "Pay the Contents of this Bill unto the Order "of Mr. *Fiſher*." *Fiſher* brought his Action *as Indorſee*. The Defendant demurred to the Declaration, becauſe the Indorſement was not to *Fiſher* Himſelf, but to *his Order*. But the Court held that *Fiſher* might well bring the Action: "For amongſt Tradeſmen, that Form was commonly uſed, "though intended to be made payable to the *Perſon whoſe* "*Order is mentioned.*" And *Fiſher* had Judgment.

Therefore a Note indorſed over to *A.* would enable Him to indorſe it over to *B.* and ſo on. For the *Convenience and Courſe of Trade* is to be attended to: The *Intention* is

* to be regarded, not the Form. The *Cuſtom of Merchants* is *Part* of the *Law of England:* And Courts of Law muſt take Notice of it, as ſuch. * P. 1228.

There may indeed be *ſome* Queſtions depending upon Cuſtoms amongſt Merchants, where, *if* there be a DOUBT *about the Cuſtom*, it may be fit and proper to take the Opinion of Merchants thereupon: Yet that is only where the *Law* remains *doubtful.* And even there, the Cuſtom muſt be proved by *Facts*, not by OPINION only; And it muſt alſo be ſubject to the Control of Law: And ſo was the Caſe of *Hawkins* v. *Cardy*, reported in *Carthew* 466, and in 1 *Salk.* 65. There the Defendant had given a Note under his Hand, "to pay unto *E G.* or Order a certain "Sum of Money:" "*E. G.* by Indorſement on this Note, "ordered PART *of the Money* to be paid to the Plaintiff. "Upon which, this Action was brought: and a ſpecial "*Cuſtom* amongſt Merchants was laid in the Declaration, "according to the Plaintiff's Caſe." Upon a Demurrer to this Declaration, It was adjudged "that this is a *void* "Cuſtom; becauſe by Means of ſuch Diviſion, the De-"fendant would be ſubject to as many Actions, as the "Perſon to whom the Note was given ſhould think fit; "and this upon a *ſingle Contract* which ſubjected Him to "One Action only." This warrants what I ſaid, "That "the *Original Contract* muſt be looked into." Here, the Original Contract is a *negotiable* Bill; and the Indorſee is in the *Place* of the Original Payee.

The two Caſes of *More* v. *Manning*, and *Acheſon* v. *Fountain*, ſerve to prove "That there is NO *ſuch Cuſtom of Mer-"chants*, as the Defendants pretend:" For they could not have been ſo determined as they were, *if* there *had* been ſuch a Cuſtom of Merchants.

Therefore theſe *judicial* Determinations of the Point are the LEX MERCATORIA, as to *this* Queſtion: For they ſettle what *is* the Cuſtom of Merchants; which Cuſtom is the *Lex Mercatoria*, which is part of the Law of the Land. But this Finding of the Jury in the preſent Caſe, is directly *contrary* to the *Lex Mercatoria* ſo fully ſettled and eſtabliſhed by legal Adjudications.

Therefore the Verdict ought to be ſet aſide: but it ſhould be without Coſts, for the Reaſons already ſpecified.

Per Cur. unanimouſly,
The VERDICT was ſet aſide, and a NEW TRIAL ordered; (but without Coſts.)

* Baſkerville *verſ.* Brown; et é contra.

* P. 1229. *Wedneſday 10th June 1761.*

BROWN brought an Action againſt *Baſkerville* upon two Promiſſory Notes amounting (both together) to the Sum of 30*l.* The Cauſe was entered and tried before Ld. *Mansfield* at the Sittings: And the Plaintiff took a Verdict, for the *Whole* of his Demand.

Baſkerville had alſo brought an Action againſt *Brown*, for 11*l.* 18*s.* for Taylor's Work done by Him for *Brown*; And this Cauſe was likewiſe entered and tried at the very ſame Sittings: But it happened that the former Cauſe (wherein *Brown* was Plaintiff) was firſt entered and firſt tried.

In the latter Cauſe, (wherein *Baſkerville* was Plaintiff,) the therein Defendant (*Brown*) had given Notice of a *Set-off* of *ſo much* of the before-mentioned two Promiſſory Notes, as would ſuffice to anſwer *Baſkerville*'s Demand againſt Him; And He was ready, at the Trial, to have done ſo, notwithſtanding his having taken a Verdict for the whole 30*l.* in the Cauſe wherein he was Plaintiff: But *Baſkerville*'s Counſel oppoſed this; and inſiſted that *Brown* had *eſtoped* Himſelf from making this Set-off, by having taken a *Verdict* for the *Whole* of his Demand; whereas He ought (as they inſiſted,) to have *left out* ſo much, in taking his Verdict, as was equal to *Baſkerville*'s Demand upon Him.

Lord MANSFIELD, at the Trial, inclined againſt allowing the Set-off: But He thought it a Matter that deſerved Conſideration.

It was accordingly brought before the Court, for their Conſideration, in the Form of a Motion made on the Part of the Defendant *Brown*, for a Rule upon *Baſkerville* the Plaintiff, to ſhew Cauſe Why the Verdict (which had been found for *Baſkerville*) ſhould not be ſet aſide; and why the Defendant *Brown* ſhould not have the Coſts of a Non-Suit.

Mr. *Norton* and Mr. *Yates*, on Behalf of the Plaintiff, *Baſkerville*, now ſhewed Cauſe againſt this Rule. And beſides urging what they had inſiſted upon at the Trial, they added further, That the * Statute only ſays "that the "Defendant *may* ſet off the Debt due to Him from the "Plaintiff;" but does *not compel* Him to do ſo: And here, the Defendant *Brown* had actually made his Election "NOT "*to do it*," by taking a Verdict for his *whole* Demand in the Cauſe wherein He was Plaintiff. And they inſiſted that the *Nature* of the Debt is *changed*, and the former Debt *extinguiſhed*

* *V.* 2. *G.* 2. *c.* 22. §. 13

guiſhed by the Verdict; So that it *can not* be ſet off, in an Action tried *after* that Verdict had been given. * P. 1230.

To this, it was anſwered by Mr. *Morton* and Mr. *Stowe*, (in Support of the Rule)—That the Debt remains *unchanged* in its Nature, and *unextinguiſhed*, notwithſtanding the Verdict. And it might have been ſtill ſet off, they ſaid, in the preſent Action, without any Inconvenience: For if *Brown* ſhould attempt to take out Execution for the *Whole*, in the other Action wherein He was Plaintiff, *after* a Set-off in this Action, Either the Court would ſet the Matter right, (even with Coſts,) or *Baſkerville* might have Redreſs by an *Auditâ Querela*. But *Brown* was *obliged*, they ſaid, to take his Verdict for the *Whole* of his Demand: For he could not be ſure that *Baſkerville* would try his Cauſe at all; and then *Brown* would have entirely *loſt* this Sum of 11*l.* 18*s.* *Brown* did all He could to come at a fair Balance: He could do no more than plead it, or give Notice to ſet it off, *as it ſtood* at the *Time* of the Plea pleaded. The *Fault* was in *Baſkerville*. He ought to have ſet off his Demand upon *Brown* of 11*l.* 18*s.* againſt *Brown*'s Demand upon Him of 30*l.* And then complete Juſtice had been done eaſily and at once. He *ought not* to have brought his Action againſt *Brown*, *at all*.

CUR. ADVIS'.

Lord MANSFIELD now delivered the Reſolution of the Court.

The Meaning of the * Act of Parliament, He ſaid, was, that in all Caſes of mutual Debts, the leſs Sum ſhould be deducted out of the greater, *if the Defendant deſires it.*

* See the Stat. of 2 *G.* 2. *c.* 22. §. 13. for ſetting off mutual Debts, one againſt the other.

But *Brown could not compel Baſkerville* to ſet off his leſs Demand upon *Brown*, againſt *Brown*'s greater Demand upon him: Nor could *Brown* have ſafely taken his Verdict for leſs than his *whole* Demand. Yet *Baſkerville* Himſelf might have done this without Prejudice, and with perfect Safety: And he ought to have done it. But he declined doing it; and at the ſame Time brings his Action againſt *Brown*, for what he might, without Prejudice, have ſet off againſt *Brown*'s Demand upon him.

Therefore it was litigious and vexatious in him not to do it, when he might ſafely and eaſily have done it; but choſe, inſtead of it, to commence an Action againſt *Brown*.

Both Actions ſtood together for Trial: But it happened that the Caſe of *Brown* v. *Baſkerville* ſtood firſt. *Brown* took his Verdict for the *whole* Demand upon the two Notes; there being no Plea nor Notice of any Set-off in *this* Cauſe wherein *Brown* was Plaintiff.

Then

* P. 1231. * Then came on *Baſkerville*'s Cauſe, in which he was Plaintiff, and *Brown* the Defendant: In which Cauſe, *Brown* had given Notice to ſet off ſo much as was equal to *Baſkerville*'s Demand upon Him. This He would have done: But it was oppoſed; and the Objection ſeemed ſpecious.

But We are All clearly of Opinion, upon full Conſideration, "that the Debts might be ſet off, One againſt the "other in this latter Cauſe, notwithſtanding *Brown*'s hav-"ing taken a Verdict in the former for his whole De-"mand." For if at the *Time of the Action brought*, the Defendant may ſet-off one Debt againſt the other, or plead (if a larger Sum be due from the Plaintiff to Him, than from Him to the Plaintiff,) in Bar of the Plaintiff's Action; *Brown* had a Right in the Cauſe wherein He was Defendant, to give this Notice of a Set-off, *at the Time* when He gave it. And *Baſkerville* might, in the Cauſe wherein He was Defendant, have ſet off ſuch part of the larger Sum due from Him to the Plaintiff *Brown*, as was equal to the Debt due to Him from the Plaintiff, if he had thought proper. And *Brown*'s Notice to ſet off againſt *Baſkerville*'s Demand told him, that *Brown* was *ready to ſtrike a Balance* between the mutual Debts, and to be *content with the Difference* between them: and it ſpecified the Nature of *Brown*'s Demand upon Him, as the Act requires.

Thus it ſtood *before* the Verdict: The Debt due to *Brown* was a mutual Debt; and Notice was given of it, and upon what Account it became due, and that it was intended to be inſiſted on. And *after* the Verdict, it ſtill REMAINED *a mutual Debt*, as it did before. The Verdict did *not* annihilate or extinguiſh the Debt; nor change the Nature of it, or the Rule of Law: It only amounted to *concluſive Evidence* of it. So that *Brown* had the ſame Right to ſet it off, *after* the Verdict, as he had before the Verdict.

We are of Opinion, this Right to make the Set-off ſtill remained in *Brown*, both within the *Words* and *Reaſon*, and *Intent* of the Act of Parliament: And that the Debt was *neither extinguiſhed*, nor its *Nature changed*.

Baſkerville was the only Perſon in Fault: And He ought not to have brought his Action.

Brown was right all along: He could not have taken his Verdict for leſs than He did, with Safety. He may now *remit* ſo much of the Sum He has recovered, as will bring the mutual Debts to a juſt Balance: And this He *ought* to do.

But

* But it would be ſtrange, if the mere Accident of the Priority of Trial ſhould, by his Cauſe's happening to ſtand firſt in the Paper, preclude Him from taking the Benefit of the Act, according to his Notice rightly and truly given at the *Time* when it was given. * P. 1232.

Per Cur. unanimouſly,

VERDICT ſet aſide; And the Defendant to have Coſts of Non-ſuit: And *Brown* to remit ſo much of his Damages recovered in the other Action, as exceed the Balance of the mutual Debts.

Sir John Aſtley Bart. *verſ.* Young.

THE Plaintiff's Declaration conſiſted of *two Counts*. The Defendant *demurred to the One*, and obtained Judgment thereupon. To the *Other*, *he Pleaded:* and upon Trial of the Iſſue joined, the Verdict was *for the Plaintiff*. The Queſtion was, In *what Manner* the COSTS ought to be taxed.

Note—Theſe were *ſingle* Pleas, at Common Law. (As to *double* Pleas pleaded by Leave of the Court under the 4, 5 *Ann. c.* 16. §. 4. See a former Caſe, of *Cooke* v. *Sayer*, *Friday 9th February* 1779. *ante pa.* 670 to 672.)

The COURT were All, except Mr. Juſtice *Foſter* who was gone, unanimous That in the preſent Caſe, the Plaintiff was intitled to Coſts upon his Verdict; and the *Defendant* to *None* upon his Demurrer: For that the Plaintiff having prevailed upon One of his Counts, had a Right to have his Coſts upon *that* Count, without any Deduction to be made on Account of the Defendant's having gotten Judgment upon his Demurrer to the *other* Count.

Rex *verſ.* Higginſon.

ON *Monday* 13th of *April* laſt, Mr. *Morton* moved in Arreſt of Judgment; the Indictment upon which the Defendant had been convicted, being (as He alledged) *too general:* And he obtained a Rule to ſhew Cauſe why it ſhould not be quaſhed. It was in theſe Words—*Middleſex*—The Jurors for our Lord the King upon their Oath preſent, That *Thomas Higginſon* of *James Street* in the Pariſh of *St. Martin in the Fields* in the County of *Middleſex* Yeoman, on the ſixth Day of *November* in the firſt Year

*P. 1233. * Year of the Reign of our Sovereign Lord *George* the Third now King of *Great Britain &c.* and on divers other Days and Times between that Day and the Day of the taking of this Inquiſition, with Force and Arms, at the Pariſh aforeſaid in the County aforeſaid, did *keep and maintain* and yet doth keep and maintain a certain *common ill-governed* and *diſorderly Houſe* ; and in the ſaid Houſe, *for his own Lucre and Profit*, certain *evil and ill-diſpoſed Perſons, of ill Name and Fame and of diſhoneſt Converſation*, to *frequent and come together*, then and the ſaid other Days and Times, there *unlawfully and wilfully did cauſe and procure* ; and the ſaid Perſons in the ſaid Houſe, then and the ſaid other Days and Times, there to be and remain, FIGHTING OF COCKS, BOXING, PLAYING AT CUDGELS and MISBEHAVING THEMSELVES, *unlawfully and wilfully did permit and yet doth permit :* To the great Damage and *common* NUSANCE of all the Subjects of our ſaid Lord the King inhabiting near the ſaid Houſe ; and againſt the Peace of our ſaid Lord the King, his Crown and Dignity.

Cauſe being now ſhewn againſt Mr. *Morton*'s Rule "to "ſhew Cauſe why the Judgment ſhould not be arreſted,"—

The COURT (excluſive of Mr. Juſtice *Foſter*, who was gone,) ſaid it appeared to them to be a good Indictment ; and (without Argument) diſcharged the RULE.

The End of *Trinity* Term 1761, 1 *G.* 3.

And of the SECOND VOLUME.

A TABLE

A

TABLE

OF THE

PRINCIPAL MATTERS

Contained in * *this* Volume.

* *N.B.* The Table to the preceding Volume is now (in this 2d Edition) *as full*, in the former Part of it, as in the latter.

Acknowledgment—

OF a Debt, *after Commencement* of the Action, takes it *out* of the Statute of Limitations. *Page* 1099.

Acts of Parliament.

The *Right of Printing* them and Abridgments of them. *Page* 664. See *Printing, Univerſity.*

Action

Of Treſpaſs for *meſne Profits* and Coſts after Judgment in Ejectment. 668. See *Meſne Profits, Ejectment.*

On the Caſe, for *libellous* Words, ſpoken or ſworn in a *Court of Juſtice*, in a Man's *own Defence* againſt a Charge upon him in that Court, will *not lie*; Becauſe it is in a *legal* and *judicial* Way. 810 to 813. See *Affidavit, Libel.*

On the Caſe—is a *liberal* Action. 906, 1011, 1012.

On the Caſe, *for* MONEY HAD AND RECEIVED TO THE PLAINTIFF'S USE—

C. gave 4 promiſſory Notes to *A.* for 30*s.* each. *A. indorſed them* to *B. in order* to enable *B.* to recover the Money, in his own Name, againſt *C.* But *C. ſigned an* AGREEMENT "That *A.* ſhould *not be liable* to the "Payment of the Money or any Part of it, nor be "*prejudiced*, nor *put to any Coſts*, nor *any way ſuffer*, "by reaſon of ſuch his Indorſement." Notwithſtanding which expreſs Agreement in Writing, and contrary to it, *C. ſued A. in the Court of Conſcience*, on each of the 4 Notes, as Indorſer; and received 6*l.* of Him, under the Order of that Court; though *A.* tendered and offered to prove to them the ſaid Indemnity and Agreement ſigned by *C:* Which the Commiſſioners thought *They* had *no Power to judge of*, and that it was therefore

therefore *no ſufficient Bar* to the Suit in *their* Court. They therefore decreed for *C.* in one of the Cauſes; and *A.* paid in the Money, upon the 3 others: And *C. took out* the Whole, *by Order* of the Commiſſioners. It was reſolved—

1ſt. That *A.* may recover *this Money* from *C.* in the *preſent Form of Action viz.* "*for Money had and received to his* "*Uſe.*" *Page* 1012. He may *wave* any Demand upon the Foot of the Indemnity, for the *Coſts* he had been put to; and bring this Action to *recover the* 6*l.* which *C. got* and *kept* from him iniquitouſly. *ibid.*

2d. An Action of *Aſſumpſit* will lie in many Caſes where *Debt does lie*, and in many where Debt does *not* lie. 1008.

3d. A main inducement, originally, for *encouraging Actions of Aſſumpſit*, was, *to take away the Wager of Law. ibid.*

4th. *If* the Defendant be under an *Obligation from the ties of Natural Juſtice*, "TO REFUND; the *Law implies a Debt* and *gives this Action. ibid.*

5th. *This Species of Aſſumpſit* lies in many Inſtances, for Money received from a *third* Perſon, under *lawful Authority*. 1008, 1009.

6th. Though the *Merits* of a *regular Judgment* can *never be overhaled by an original Suit*, yet the ground of this Action is *conſiſtent* with the Judgment of the Court of Conſcience. 1009.

7th. *That Court acted right*, in refuſing to go into the collateral Matter. *ibid.*

8th. The Ground of the preſent Action is "That the "Defendant ought not to KEEP the Money." *ibid.*

9th. This Action is *beneficial* both to *Plaintiff* and *Defendant*. 1010.

1ſt. The Plaintiff may *declare generally*, and make out his Caſe at the Trial. 1010.

2dly. The Defendant can be *liable no further than the Money He has received*; and againſt *that*, may go into an *equitable Defence* upon the general Iſſue; *claim every equitable Allowance*; prove a *Releaſe*, *without* pleading it; and defend Himſelf by *whatever* may ſhew that the Plaintiff, *ex æquo et bono*, is *not intitled* to the *Whole* or any *Part* of his Demand. 1010.

10th. *This* Action is a *Bar* to the Plaintiff's bringing an Action *upon the Agreement* (though He might *recover more* in *that* Action, than in *this.*) 1010.

11th. *This* Action *lies* only for Money which the Defendant *ex æquo et bono*, *ought not to* KEEP. 1011, 1012.

12th. It *lies not* for Money *paid* as due in *Honour and Honeſty*, though *not recoverable by Law*. 1012: as

1ſt. Payment of a Debt *barred* by the *Statute of Limitations. ibid.*

2dly. Or *contracted during Infancy. ibid.*

3dly.

3dly. Or the Extent of Principal and *legal* Intereſt upon an *uſurious* Contract. *Page* 1012.

4thly. Or Money *fairly loſt at Play*. *ibid.*

13th. But it *lies* for Money *paid by Miſtake*; or upon a Conſideration which *happens to fail*; or for Money got through *Impoſition* (expreſs or implied,) *Extortion*, *Oppreſſion*, or *undue Advantage* taken of the Plaintiff's Situation, contrary to Laws made for Protection of Perſons under thoſe Circumſtances. *ibid.*

14th. The Gift of *this* Action is That the Defendant upon the Circumſtances of the Caſe, is *obliged* by the Ties of *natural Juſtice* and *Equity*, to *refund* the Money. *ibid.*

Penal—*Amendment* of the *Declaration*—The Rule laid down. 1098, 1099. See *Amendment*, *Declaration*.

Treſpaſs VI ET ARMIS and *Treſpaſs on the* CASE cannot be joined in the ſame Action. 1114.

Affidavit

To hold to *ſpecial Bail* muſt be *poſitive*. 655, 1032. See *Bail*.

Not libellous, where made in a *Court of Juſtice*, in *Anſwer to a Complaint* on Oath, or to Affidavits made in Support of ſuch Complaint; though the Expreſſion uſed, was—"Which Sir *J. A. hath ſo* FALSELY *ſworn* a-"gainſt Him," (the Defendant.) 809 to 813. See *Action*.

To obtain Leave to plead *Ancient Demeſne*, to an Ejectment. 1048. See *Ancient Demeſne*.

Affirmation

Of a Quaker. 999 to 1004. and 1117. See *Quaker*.

Amendment.

The Court have *not* uſed the ſame *Strictneſs*, of late Years, as formerly: And this is better for the Parties. But They will take Care, that the adverſe Party ſhall not receive *Prejudice* or *Delay*, by the Amendment. 756. See *Pleading*.

Of a Plea, on Payment of *Coſts*, with Liberty to *reply de novo*; where to be *allowed*, and *what Coſts* to be taxed. 756 and 758. See *Repleader*, *Coſts*.

An *Order of Removal* was ſent down to be amended, for a Miſtake in a Matter of *Fact*. 911. See *Orders of Removal*.

Of a DECLARATION, by *changing the Venue*—

1ſt. May be *made at any Time* whilſt the Proceedings are in Paper. 1098, 1099.

2d. This is an Amendment at *Common* Law. *ibid.*

3d. There is no Difference between an Amendment in *Civil* Actions and in *Penal*; when an Amendment at *Common* Law is applied for, and all is in Paper. *Page* 1098, 1099.

4th. But the *Statutes* of Amendment do *not* extend to *penal* Actions. *ibid.*

A *Declaration* in a *Qui tam* Action for Uſury, was amended, in *altering the Date* of the Note; All being *in Paper. ibid.*

In *Ejectment*—is now carried *much farther* than formerly; and, *after* Verdict, is *not neceſſary* to be *applied for* or *actually made*, in Caſes of mere *Miſtake of the Clerk*; but the Court will *overlook* the Exception. 1162. See *Ejectment.*

Ancient Demeſne

May be pleaded in *Ejectment*, by *Leave* of the Court, and upon a *proper Affidavit.* 1047, 1048.

But the Court will not ouſt themſelves of Juriſdiction, in Favour of ſuch a *ſtrange wild Juriſdiction* as this, without a *very ſufficient Affidavit. ibid.*

Such *Affidavit* muſt ſhew "That the Lands are holden of "a Manor, *which* MANOR is itſelf Ancient Demeſne; "and that the Matter *can be tried* in the Court of that "Manor; and that there *are Suitors there*:" And it muſt ſhew "That the Demandant has a Freehold." *ibid.*

Doomſday-Book will not ſhew whether the *particular Lands* are Ancient Demeſne: It will only ſhew whether the *Manor* is ſo, or not. 1048.

Arbitration, Arbitrators.

The Act of 9, 10 *W.* 3. *c.* 15. "for determining Diffe-"rences, by Arbitration," was made, to put Submiſſions where *no Cauſe* was depending, upon the *ſame Foot* with thoſe where there *was* a Cauſe depending: And it is only declaratory of what the Law was before, in the *latter Caſe.* 701.

Articles of the Peace

Ought to be exhibited in the *Neighbourhood*; that the Security may be given there: And accordingly, a Man reſiding at the *Devizes*, and coming hither to exhibit Articles againſt another Man reſiding alſo at the *Devizes*, was rejected here, and referred to his own Neighbourhood. 780. *V. infra* 1039.

The *Facts ſworn* muſt be taken to be TRUE; and the Court *cannot* give the Defendant leave to *diſpute* them; (as the Court declared in Ld. *Vane*'s Caſe in *H.* 1743. 17 *G.* 2.) Yet one *Robert Parnel* having ſworn the Peace againſt

againſt Sir *Thomas Allen* and his Servants, and coming afterwards into Court, to complain of meeting with Difficulties in obtaining Proceſs, it manifeſtly appeared, upon the ſhewing Cauſe againſt this Complaint, "That his "Articles were groſsly *malicious* and totally *untrue*:" Whereupon, the Court *ſtayed Proceſs* againſt the Defendants, and *committed Parnell* for *Perjury*; (of which He was afterwards convicted.) *Page* 806.

Being exhibited in *London*, for a Fact at *Portſmouth*, the Attachment was ordered to be *indorſed* with a Direction and Authority to any Juſtice or Juſtices of *Peace* in that *County* (of *Southampton*) "*to take* the Security of the "Peace THERE;" Such Indorſement ſpecifying the Sums wherein the Parties ſhould be bound. 1039, 1040. *V. ſupra* 780.

Aſſurance. See *Inſurance. Policy.*

Aſſurance. See *Conveyance, Common Recovery.*

Attachment

Shall go againſt an *Under*-Sheriff, for *improperly executing the Rule of the Court.* 797. See *Pillory.*

Attorney

Was ordered to *pay Coſts* (as well as his Client,) having joined in an Affidavit to ſupport a frivolous Complaint, and made reſentful Declarations which ſhewed him to be *perſonally* active in it. 654. See *Information.*

Averment. See *Pleading.*

The Word "*being*" is a ſufficient Averment 834.

The Plaintiff muſt *aver Performance* of what is to be done on *his* Part, or ſhew that He was *ready* to perform it. 900.

The *Want* of this may be helped by a *Verdict*; but not by a Judgment by *Default. ibid.*

The Veritas *Facti* may (in ſome Caſes) be averred againſt the Fictio *Legis*; As where the *true* Time of *ſuing out a Latitat* is *material*, It may be ſhewn *notwithſtanding the Teſte*, 966. See *Pleading*, 950 to 969.

So, the *Time of ſigning a Judgment* may be ſhewn, in the Caſe of PURCHASERS, (who are bound *only from* the Signing:) But *None elſe* ſhall be permitted to aver "That "a *Judgment* was ſigned *after* the firſt Day of the Term;" nor can it be averred "that a *Fieri facias* was taken out "in

"in the *Vacation*;" Becauſe the *Fact* is not relevant, nor do the legal Conſequences depend upon the *Truth* of *it*, but upon the *Rule of Law*. *Page* 967.

Of the WANT *of Qualifications*—Where neceſſary or not neceſſary in an *Indictment*. 1036, 1037. See *Indictment*.

Bail

Common—Special—The *Affidavit* to hold to Special Bail muſt be POSITIVE: A *poſitive Oath of the Debt* is required both by the *Act of Parliament* and by the *Eſtabliſhed Rule* of the Court. 655.

1ſt. By 12 *G.* 1. *c.* 29 §. 1, 2. No Perſon ſhall be held to *Special* Bail, for any Cauſe of Action under 10*l.* in a *ſuperior* Court, and 40*s.* in an *inferior* Court. Of which Cauſe of Action, *Affidavit* ſhall be made and filed; and the Sum therein ſpecified, indorſed on the Writ or Proceſs: For which *indorſed Sum*, the Officer ſhall take Bail, and *for no more*. 655, 656.

2dly. Swearing *only to* BELIEF, though with a *Reference to Accounts* ſent from abroad, where the Debt aroſe, will not do. 655. *Sed v. infra, ſub pa.* 1032.

Common—Special—A Debtor regularly *diſcharged* of an old Debt, but conſcientiouſly making a *new Acknowledgment* of it and a *new Promiſe* to pay it, ſhall be diſcharged upon *Common* Bail, and *not* holden to *Special*. 737, 738. See *Bankrupt*.

Upon Writs of *Error*, on 3 *J.* 1. *c.* 8. (on Bonds conditioned for Payment of Money *only*.) 746, 747. See *Error*.

It is the *Duty* of Sheriff's Officers to take it, in Actions on the Caſe: And they are puniſhable if they take Money for doing it. 926 to 929. See Statutes (23 *H.* 6. *c.* 10.)

Common—Special.—The *Affidavit* to hold to Special Bail was only "That the Defendant was indebted to the Plaintiff in *&c.* AS HE COMPUTES IT:" Yet it was thought ſufficient, by the only two Judges then in Court. 1032. *Sed v. ſupra* 655. and infra (under *pa.* 1447.)

Bailiff

To Sheriff. See *Sheriffs and their Bailiffs*: Alſo *Statutes* (under 23 *H.* 6. *c.* 10.)

Baker.

Baking *Puddings*, *Pies*, and *ſuch Things* for Dinner on a *Sunday*, is *not* an Offence meant by 29 *C.* 2. *c.* 7: But is within the *Equity* of the Proviſo in the 3d Section of it, as a *Cook's Shop*; and within the Exception of Works of *Neceſſity* and *Mercy*. 787, 788.

Ballaſt

Where to be *unladed. Page* 656 to 661. See *Navigation.*

Bankrupt—

Certificate is *not complete*, till ALLOWED; nor ſhall *relate* to the Signing by the Commiſſioners and Creditors; *nor over-reach* a Legacy left to the Bankrupt *after the Signing*, but *before the Allowance*, and *aſſigned* by the Commiſſioners *before Allowance:* But the *Creditors* ſhall have it, 717, 718, 719.

Bankruptcy *alone*, nay even *Inſolvency*, (which Bankruptcy does *not* neceſſarily import,) is *no* ſufficient *Cauſe of Amotion* from the Office of a *Common-Council* Man of a Corporation. 731 to 736.

A Bankrupt who had regularly *obtained his Certificate*, afterwards ſettles an old Account with a Creditor who did not appear to have come in under the Commiſſion; agrees that a Balance of 74*l.* was due from Him at the Time of his Bankruptcy; and *promiſed to pay* it, "*when He* "*ſhould be able.*"

1ſt. As to the general Queſtion, "Whether the Bank-"rupt was or was not LIABLE to the *Payment* of it, "upon this *new Acknowledgment* and *new Promiſe*;" The Court did not enter into it. 736, 737.

2dly. But they diſcharged him upon *Common Bail*; (that being the particular Queſtion before them.) 737.

Lies *two Months in Priſon* 817 to 820. (*V. ante* 439, 440)

1ſt. The *Relation*, and conſequently the *Property of the Aſſignees*, in the Bankrupt's Goods, goes back to the *Time* of the *firſt Arreſt. ibid.*

2d. If *Execution* (a *Fi. fa.*) is ſued out againſt a Trader's Goods, *returnable* WITHIN the two Months, but *not* ACTUALLY *returned* till *after* He has lain two Months; 1ſt. "*Nulla bona*" is a *good* Return: Becauſe it is *then* certainly a *true* One. *ibid.*

2dly. But *Qu.* Whether it would have been ſo, if the Return had been made UPON the Return-Day, which was *within* the 2 Months, when it was *uncertain* whether He *would* or would *not* lie the two Months in Priſon. *ibid.*

3dly. In the laſt Caſe, if the Sheriff had returned "That "He *had levied* the Money," and had *actually paid it over* to the Plaintiff, the *Sheriff* might have been excuſed; but the PLAINTIFF muſt *refund* it to the Aſſignees. *ibid.*

L, a Trader, being *really indebted to W*, (in about 1840*l.*) ſent for *W*; told him "He *could not ſtand his Ground*," and propoſed to ſecure *Him*. Accordingly, He executed a general *Aſſignment* to *W*, of EVERY THING *that He had in the World:* But *after Payment* of *W*'s Debt, it was to be

be *in Truſt for L Himſelf*, as to the Reſidue. A Defeazance, in a ſeparate Deed, was ſoon after executed, making the Aſſignment void, upon Payment of *all* the Money due to *W* (who had been concerned with *L* in circulating Notes, many of which were outſtanding): But *neither* the Aſſignment nor Defeazance *particularly liquidated* HOW MUCH *Money was due* from *L* to *W*. The Deed of Aſſignment *recited L*'s being "*obliged*, upon urgent and ne-"ceſſary Buſineſs, *to leave London*; and that He *could not* "*raiſe Money ſoon enough* to anſwer *all the Demands* that "*W* had upon him." There was *no Counterpart* of this Deed: And the Original *remained in the Keeping of L* the Aſſignor. No *Poſſeſſion* was delivered: Only, *L* gave a *Letter of Attorney* to *B. his* OWN *Clerk*, (a Perſon privy to the Whole,) to collect receive diſpoſe &c; *the Goods ſtill continuing in L's Houſe. No Notice* was given to *L's Debtors*. *Page* 827. *V. ſupra* 467. to 485. almoſt S. P.

1ſt. This DEED *alone* is *itſelf* an *Act of Bankruptcy*; 'Tis *within* 21 *J.* 1. *c.* 19. §. 2. and, if permitted, would *defeat* the whole Syſtem of the Bankrupt Laws. 829 to 833. *V. ſupra* 467. to 485.

2dly. The CIRCUMSTANCES confirm this: Particularly, there being NO *viſible Change of Poſſeſſion*, a *ſecret Tranſaction, no Notice &c.* 830.

3dly. It was reſolved,—

1ſt. That a Trader (even *before* Bankruptcy,) *can not* PREFER One or more Creditor or Creditors to the *Reſt*, by a Conveyance of his WHOLE Eſtate and Effects. 829 to 833. *V. ſupra* 484.

2dly But he may *pay* a particular Creditor; or He may *mortgage* a PART of his Eſtate or Effects (at leaſt) to a particular Creditor, provided He *delivers Poſſeſſion* at the ſame Time. 831. *V. ſupra* 484

3dly. Yet a COLORABLE *Exception of a ſmall Part* would not *(per* Lord *Mansfield)* help the Matter: For the Court would not ſuffer ſuch an *Evaſion* to prevail. 832.

4thly. The *Syſtem* of the Bankrupt Laws is "That the "Bankrupt's Effects ſhall be taken OUT *of his* OWN "*Poſſeſſion and Management*, and put under that of the "*Commiſſioners*; and be divided *equally*, *i. e.* proportionally, amongſt all his Creditors, 829, 830.

5thly. Therefore *L became a Bankrupt* the *Moment He executed this Deed*, which puts his WHOLE Eſtate under the Management of *his* OWN *Truſtee*, inſtead of the Commiſſioners; and aſſigned it ALL to One Creditor, leaving *Nothing* for the Reſt. 830.

A *Mortgage* by a Trader, of *Ships abroad*, or of *Cargoes upon the high Seas*, is good (notwithſtanding the Clauſe in 21 *J.* 1. *c.* 19) though Poſſeſſion be not actually delivered 941.

John

John Perrot a Bankrupt, upon the *laſt* Day allowed him, had this Queſtion propounded to him in Writing by the Commiſſioners—" As You do admit that You have ſpent the " laſt Week with Mr. *M.* One of your Aſſignees, to " ſettle and adjuſt your Accounts and to draw up a true " State thereof, to enable you to cloſe your Examination; " and do likewiſe admit that upon ſuch State thereof it " appears that after giving You Credit for all Sums of " Money paid by You, and making You Debtor for all " Goods ſold and delivered to You, from your firſt Com- " ing into Trade to the Time of Bankruptcy, it appears " that there is a Deficiency of the Sum of 13513 *l.* " Give a true and *particular* Account *what is become* of " the ſame; And *how and in what Manner* you have " applied and diſpoſed thereof:" To which Queſtion He *refuſed* to give any other than this *general* Anſwer, " That on Goods ſold this laſt Year, He had loſt upwards " of 2000 *l.* And by Mournings, upwards of 1000 *l.* " And that for 9 or 10 Years, He had been *extremely ex-* " *travagant*, and *ſpent* LARGE Sums of Money." Whereupon they committed him, until he ſhould ſubmit Himſelf &c. and FULL Anſwer make, to their Satisfaction, to the ſaid Queſtion. On *Habeas Corpus*, He was remanded. *Page* 1122 to 1126.

1ſt. This Queſtion is a *proper* One; And the *Anſwer* is *inſufficient and unſatisfactory*. 1124, 1125.

2d. The POWER *of the Commiſſioners to examine* the Bankrupt is NOT *limited and confined within* the Time allowed Him to *ſubmit* to be examined: They may compel Him to make further Anſwer, *after* that Time. *ibid.*

3d. The 1 *J.* 1. *c.* 15. *continues in Force*, notwithſtanding the ſubſequent Statutes: And *all* the Bankrupt-Acts ought to be taken *together*, ſo as to anſwer the *general* End and Intention of the Legiſlature. *ibid.*

The ſame Man twice afterwards ſubmitted to further Examination; gave unſatisfactory Anſwers, and was remanded. The firſt Time, He petitioned the Lord Keeper; the ſecond, He brought another *Habeas Corpus* here; Both, without Succeſs. At laſt, He was convicted, and executed, for concealing his Effects. 1216.

Bargain and Sale.

Where a Deed of Bargain and Sale to make a Tenant to the *Præcipe*, and a Common Recovery, ſhall (when Both are completed) be conſidered as being All but *One* Aſſurance and *quaſi* a Conveyance to the Uſe *ab initio*. 1134. See *Deviſe*.

Berwick—

The *Conſtitution* of it. *Page* 834 to 857.
Contraſted with *Wales*. 850.
Edward 1ſt took *Berwick* into his own *Hands and Poſſeſſion*. 852.
Edward 3d procured a *Grant* and *Seſſion* of it, *ſeparate from Scotland*, for ever, and *annexed united* and *incorporated* it *regali Dignitati et Coronæ Angliæ perpetuis Temporibus. ibid.*
Berwick was again *loſt*, when He was in *France*; and retaken after his Return. *ibid.*
It was *again loſt*, and *recovered by Ed. 4th. ibid.*
Between *temp. Ed.* 4. and 33 *H.* 8. (non conſtat *when*,) *Berwick* was ſummoned, *as* a Burrough of *England*, to ſend *Members to Parliament:* And they have continued to do ſo, *by Summons*, as being *Parcel of the Realm*, and not under any Charter; For none of their Charters give them ſuch a Right. 853, 859.
They *now Act* under a *Charter* of 2 *J.* 1. *confirmed by Act of Parliament*, 2 *Jac.* 1. *c.* 28. 853.
Before the Union, *Berwick* was *bound* by every *Engliſh general* Act of Parliament, as being *Part of the Realm* of *England:* Where it is *particularly named*, that is ſuperfluous. *Since the Union*, It is bound by all *general* Laws. 853.
Berwick has no CRIMINAL *Law*, but the *Law of England*; and no *Juriſdiction* in *Criminal* Matters and *Pleas of the Crown*, but with ſuch a Reference to the LAWS of *England*, as neceſſarily *includes this Court*. 855, 859, 861.
Writs of *Venire*, and other *Jury-Proceſs* do *not run* to *Berwick*; becauſe they are *exempted* from being ſummoned *out* of the Burrough, to ſerve upon Juries. 855.
And perhaps *Original Writs*, which are the Commencement of Suits between *Party* and *Party*, may not. *ibid.*
But *other* Writs miniſterially directed *may* run there. *ibid.*
Writs *not* miniſterially directed, (*Prerogative*-Writs) ſuch as Writs of *Mandamus*, *Prohibition*, *Habeas Corpus*, *Certiorari*, are reſtrained by no Clauſe in the Conſtitution given to *Berwick: They* may iſſue (upon a proper Caſe,) to *every Dominion* of the *Crown* of *England*. 855, 856.
To *foreign* Dominions belonging to a Prince who *ſucceeds* to the Throne of *England*, this Court has *no Power* to ſend *any* Writ of *any* kind; They cannot ſend a *Habeas Corpus* to *Scotland*, or to the *Electorate*. 856.
But, to *Ireland*, the Iſle of *Man*, the *Plantations*, to *Guernſey*, to *Jerſey*, They *may:* (And ſo, formerly, to *Calais*.) *ibid.* However, upon Impriſonments in theſe latter Places, the ordinary Method is to complain to the *King in Counſel*, and get an Order to bail or diſcharge. *ibid.*

Precedent

Precedent of a *Habeas Corpus* to *Berwick*, in 43 *Eliz.* *Page* 856.

A *Prohibition* alſo will lie thither. *ibid.*

And a *Mandamus*. *ibid.*

And of *Certioraries*, there are ſeveral Precedents. 857. And there is no Doubt but the Court, by Law, *has Authority* to ſend Writs of *Certiorari* thither. *ibid.*

Informations for Miſdemeanours in *Berwick*, have been, and may be granted by the *Court*, or filed by the *Attorney General*. 860.

Where this Court of *B. R* have Juriſdiction of the Matter; If, from any Cauſe, it can not be tried *in* the Place, it ſhall be *tried as near* as may be. 859.

This general Rule has been *often applied* to *Berwick*. 860.

But where a local Matter ariſing at *Berwick* is ſo tried, there muſt be a *Suggeſtion*. *ibid.* and 863.

The *form of ſuch Suggeſtion*; (namely, "becauſe the King's "Writ doth *not run there*, and becauſe the Burgeſſes "ought not to be put upon Juries to ſerve *out* of their "Burrough.") 863.

Every Rule of the Common Law, which holds in the Caſe of *Wales*, concludes *à fortiori* to *Berwick*; both as to the *Juriſdiction of this Court*, and as to the *Method of Trial*. 861.

Northumberland is the *neareſt Engliſh* County, for the Purpoſe of Trial. *ibid.*

A *Doubt* "Whether a *fair impartial* or *ſatisfactory* Trial or "Judgment can be had, *in* the Place," is a ſufficient *Reaſon or Ground* to remove the Cauſe, even from the *higheſt* inferior Juriſdiction. *ibid.*

In the preſent Caſe, it was clear, That a fair Trial *could* NOT be had in *Berwick*: And therefore the Court ordered the Trial to be in *Northumberland*. *ibid.*

But *unleſs* the Matter *could* be tried OUT *of Berwick*, it *ought* NOT to have been removed by *Certiorari*. 863.

Nor ſhall the *Certiorari* be uſed for DELAY. *ibid.* And the Rule was drawn up ſo as to *obviate* any DELAY. 864.

Bill of Exchange. See *Promiſſory Note.*

In Actions upon INLAND Bills of Exchange, brought by an Indorſee *againſt an Indorſer*, the Plantiff muſt *prove* a Demand from or due Diligence uſed to get this Money from the ACCEPTER; but needs not prove any Demand from or Inquiry after the firſt DRAWER. 676, 678. The Indorſee does not truſt to the Credit of the *Original* Drawer: The Indorſer is *his* Drawer, and the Perſon to whom He truſted in Caſe the Drawee ſhould not pay. 675.

In Actions upon FOREIGN Bills of Exchange, this Point was formerly ſettled, "That a Demand upon the Drawer "is NOT neceſſary, in order to charge the Indorſer:" And there is no Difference between *Foreign* and *Inland*

Bills, in this reſpect, except as to the *Degree* of Inconvenience. *Page* 675.

As to INLAND Bills, Chief Juſtices at *Niſi prius* have been of *different Opinions* about the *Neceſſity of ſuch Proof.* 672, 673, 674.

Yet *Holt's Opinion* ſeems to have been miſapprehended and miſreported, and may be *reconcileable* with the preſent ſolemn Reſolution. 677, 678.

The Drawee is the *original Debtor* (after Acceptance:) The Drawer is only liable in his *Default.* 674.

If the *Accepter* is not called upon *within a reaſonable Time* after the Bill is become payable, and happens to break, the *Drawer* is *not liable at all. ibid.*

An *indorſed* Bill becomes, by ſuch Indorſement, a *new* Bill, as between the Indorſer and Indorſee: And the Indorſer ſtands in the *Place of the Drawer. ibid.* And if the *Indorſee neglects* to demand the Money of the Drawee, and the Drawee becomes inſolvent, the *Loſs* falls upon the *Indorſee. ibid.* If He is diligent, and the Drawee refuſes Payment, his *immediate Remedy* is againſt the *Indorſer:* Though he may have another Remedy againſt the firſt Drawer, as Aſſignee to the Indorſer. *ibid.* and 675. In an Action brought by Him againſt the *Indorſer,* He is never put to prove the *Hand* of the *firſt Drawer.* 675.

If the Original Bill be made payable to the Payee OR ORDER, it becomes thereby *negotiable* and *aſſignable*; and being ſo *in its Nature* negotiable and aſſignable, may be indorſed over (*toties quoties*) WITHOUT adding the Words "*or Order,*" to the INDORSEMENT. 1216 to 1229.

1. This has been *fully ſettled* by judicial Legal Determinations. *ibid.*
2. Therefore *Evidence* ſhall not be afterwards admitted, of a *contrary Uſage* amongſt Merchants. *ibid.*
3. For the *Cuſtom of Merchants* is the LEX *Mercatoria,* and is Part of the *General* Law of the Land. *ibid.*
4. And theſe judicial Legal Determinations have *already ſettled* what *is* the Cuſtom of Merchants, and conſequently what *is* the *Lex Mercatoria,* and conſequently what is the Law of the Land, as to the Point in queſtion: *After* which, it ought not to be left to the Opinion of a Jury. *ibid.*
5. A Verdict founded upon EVIDENCE *of a contrary Uſage* amongſt Merchants was therefore *ſet aſide. ibid.*
6. Where the *Law* concerning the Cuſtom of Merchants ſtands *doubtful,* there may be Evidence given to prove ſuch Cuſtom: But it muſt be proved by *Facts,* not by Opinion only; and muſt be ſubject to the Control of Law. 1228.
7. Upon the Death of ſuch an Indorſee, the Intereſt goes to his *Executor* or *Adminiſtrator.* 1223, 1224. Who may *aſſign it over*; and that, even by the *Name* of Executor or Adminiſtrator. 1225.

8. A blank Indorſement may be *filled up*, even at the Trial. *Page* 1225 and 1218.
9. Transferring a Bill *by Indorſement* differs greatly from giving a *naked Authority to receive* it. 1226, 1227.
1. 'Tis not clear that the *Former* can be *reſtrained and limited*, ſo as to proclude the Aſſignee from aſſigning it over; becauſe He has purchaſed it and its Negotiability, for a *valuable Conſideration*. *ibid.*
2. But the *Latter* may be done by *expreſs reſtrictive Words* and a *declared Intention* appearing *upon the Face* of the Indorſement: For in this latter Caſe, *No Conſideration* at all is paid for it. *ibid.*
10. *Promiſſory Notes*, and *Bills of Exchange* (both *Foreign* and *Inland*) are juſt the ſame, in theſe Reſpects; And the Determinations upon them are governed by the *ſame Rules*. 1224, 1227.
11. The Verdict was ſet aſide WITHOUT *Coſts*; becauſe the Merits were always clear for the Plaintiffs on the firſt Count, which was found *for* them; and it now appears that Nothing remained to be tried on the ſecond, which was *improperly* found againſt them; and yet the Verdict muſt be ſet aſide *generally*, and not in Part only. 1224, 1228.

Books (of *Corporations, &c.*)

The Court refuſed, on the particular Circumſtances of the Caſe, to compel a Mayor in a *ſummary* Way, to *replace the Books and Records* of his Corporation in their uſual place of keeping. 767.

Books (*printed*)

RIGHT *of printing* them. 661 to 665. See *Printing*, *Univerſity*.

Bar-*Money*. See *High-Bar Money*.

By-Law

To reſtrain the Selling of Meat, to a particular Place. 775, 776. See *Procedendo*.
Inflicting a *Penalty* to be recovered in the Court of the Corporation and *not elſewhere*. 777 to 780. See *Procedendo*, *Habeas Corpus cum Cauſa*.
Of the *Surgeon*'s Company in *London*, "That no Member "ſhall *take an Apprentice* who does not *underſtand the* "LATIN *Tongue*; His Ability wherein ſhall be "TRIED by the Governors or One of them, *before* his "being bound," is a *good* By-Law. 892 to 897. And a Return to a *Mandamus*, "That the young Man was "found

" found upon ſuch Trial to be, and in Fact was *utterly* " *ignorant of it*," was allowed. *Page* 892 to 897.

Capiatur—

THE Award " *quod capiatur*"—is only to bring the Defendant in, to receive Sentence; but is *not* the *final* Judgment. 801. See *Practice*, *Judgment*.

Caſes doubted or denied.

Lambert v. *Oakes*, 1 *Ld. Raym.* 433. 1 *Salk.* 126. *pl.* 6. 12 *Mod.* 244. and 1 *Salk.* 127. *pl.* 9. (there called *Lambert* v. *Pack*,) *diſcuſſed*, *denied*, and *explained*. 677, 678. See *Bill of Exchange*, *Promiſſory Notes*.

Seymour's Caſe, 10 *Co.* 95, *not* denied; on the contrary, *affirmed*, as the Facts were there expreſsly found, (which ſhewed that the Bargain and Sale was totally *unconnected* with the Fine:) But *diſtinguiſhed* from a Caſe where a Leaſe and Releaſe and a Fine were all *intended* to be, and were accordingly adjudged to be, All together, *One entire Aſſurance*. 711 to 716. See *Diſcontinuance*.

1 *Salk* 78. *Queen* v. *Darby*. 801. See *Practice*, *Capiatur*, *Judgment*.

7 *Co.* 23. *b* concerning *Berwick*. 858, 859. See *Berwick* (*pa.* 858. 859)

Hale's *Hiſt. Com. Law* 184. concerning *Berwick*. *ibid.* See *Berwick*, (*ibid.*)

Rex v. *Clendon*, 2 *Strange* 870. 2 *Ld. Raym.* 1572. " That " an Indictment will *not* lie, for an Aſſault upon *Two*"—denied. 984. See *Information*.

Rattle v. *Popham*, (2 *Strange* 992.) 1147. See *Powers*.

Certificate

Of having *apprehended proſecuted and convicted* a *Felon*, under 10, 11 *W.* 3. *c.* 23. §. 2. 1182 to 1188.

1ſt. Is *aſſignable* over, once and no more; provided it has not been uſed before. *V.* the Act, §. 2, 3.

2d. Exempts from all *Pariſh* and *Ward* Offices, within the Pariſh or Ward wherein the Felony was committed. 1183.

3d. But it will not ſerve to exempt the *Conſtable of a Manor* which comprehends the whole Town and Pariſh where the Felony was committed, *and* MORE. 1185 to 1188.

4th.

4th. For the Office of Conſtable of and for a *Manor* whereof the Pariſh is *only a Part*, is not a *Pariſh*-Office within the Meaning of this Statute. *Page* 1185 to 1188.

Certiorari

To *Berwick*. 835, 857, 858. See *Berwick*.
To *other Dominions* of the *King* or *Crown*. 856, 857, 858. See *Berwick*.
To remove an Indictment from the Quarter-Seſſions, not being iſſued till *after Confeſſion* of the Aſſault, below; a *Procedendo* was granted. 749.
To *C. B.* on "*Nul tiel Record*" pleaded in *B. R.* and iſſue joined thereon, of a Recovery in *C. B.* is the proper Method; and muſt neceſſarily iſſue. 1034. See *Pleading*.
Lies, to remove Orders made upon the *Conventicle*-Act, 22 *C.* 2. *c.* 1. even *after* Appeal, Trial by a Jury, Verdict and Judgment againſt the Defendants; notwithſtanding the 6th and 13th Sections: For the *Certiorari* does not go to try the *Merits*, but to ſee whether the limited Juriſdiction have *exceeded their Bounds* or not. 1042. And
The *Juriſdiction of this Court* (of *B. R.*) is never taken away, unleſs there be *expreſs* Words to take it away. *ibid.*

Combination

Amongſt Journey-men Wool-combers to raiſe their Wages. 1163 to 1167. See *Conviction*.

Common Recovery

May be ſuffered by a *Tenant in Tail* who has POWER to ſuffer it: But he muſt either be Tenant in Tail in *Poſſeſſion*, or have the *Concurrence of the Freeholder* claiming under the ſame Settlements. And this Principle is adhered to, by 14 *G.* 2. *c.* 20. 1072. *V. ſupra*, 116 to 119.
Where a Perſon has POWER to ſuffer it, omnia PRÆSUMENTUR *ritè et ſolemniter* acta, until the Contrary appears: But IF *the Contrary appears*, there is an End of the Preſumption. 1072, 1073, 1074. See more particularly, what ſhall be preſumed, and why, under Title *Tenant in Tail*.
Where it ſhall have *Relation* to the Date of the Bargain and Sale to make a Tenant to the *Præcipe*; ſo that when the Whole is completed, Both ſhall be conſidered as only One Conveyance to the Uſe *ab initio*. 1134. See *Deviſe*, *Bargain and Sale*.

Condition

Condition precedent

Muſt be *avered* to be *performed*, or that the Plaintiff was *ready* to perform it. *Page* 900.
The *Want* of ſuch Averment may be *helped by a* VERDICT; but not by a Judgment by *Default*. *ibid.*
In Conſideration that the Plaintiff, at the Requeſt of the Defendant, *would execute* to the Defendant a General Releaſe, the Defendant promiſes to pay: This is a Condition precedent, " to *give* or *tender* a Releaſe executed." *ibid.*

Conſent

Cannot *give* Juriſdiction to a Court that has none. 746.

Conſideration

Illegal—ſhall *not* be *aſſiſted* by the Court, nor *helped by Verdict* (where it appears upon the Face of the Declaration to be illegal.) 926 to 928.
A Promiſe to pay Money to a Sheriff's Officer, in Conſideration " That he would *accept* of the Promiſer and " *A. R.* to be *Bail* for the Perſon arreſted," is an *illegal* Conſideration. *ibid.* See *Statutes* (23 *H.* 6. *c.* 10.)

Conſpiracy. See *Indictment* 999. *Judgment villainous* 996.

To *charge with a Capital Crime*. 993 to 1000. See *ut ſupra*.
The *Puniſhment* of it. *ibid.* and 1027.

Conſtable—

Of the *Night* is guilty of a *Miſdemeanour*, if He ſuffers a Street-Walker delivered to his Cuſtody by One of the nightly Watch to eſcape. 866, 867 See *Indictment*.
Of a *Manor* including a Pariſh, but *more extenſive*, is not exempt from ſerving *this* Office, by having a Certificate under 10, 11 *W.* 3. *c.* 23. §. 2, 3: For this is *not* a PARISH-Office within that Act, 1182 to 1188. See *Certificate*.

Conveyance. See *Common Recovery*.

Where a *Deed* or *Deeds*, and a *Fine*, ſhall be conſidered as *unconnected* and having *diſtinct Operations:* And where they

they ſhall be conſidered as *one and the ſame* Conveyance or Aſſurance. *Page* 710 to 716 *Diſcontinuance.*

Where a *Deed of Bargain and Sale* and a *Common Recovery* ſhall (when Both are completed) be conſidered as *only* ONE *Aſſurance* and *quaſi* a Conveyance to the Uſe *ab initio.* 1134. See *Deviſe, Relation, Common Recovery.*

Conviction

On the 22, 23 *C.* 2. *c.* 25. §. 7. for *unlawfully* taking and killing FISH.

1ſt. The Offence meant by this Act is invading the Property of *another* Perſon; *Stealing* Fiſh, *without the Conſent* of the Owner. 682.

2dly. The Conviction muſt alledge "That the Defendant "*had not* the Licence or Conſent of the Owner." *ibid.*

3dly. A *General* Allegation, "That He took and killed "the Fiſh, *unlawfully* and *againſt the Form of the Sta-* "*tute*" is *not* ſufficient. *ibid. V. ſupra* 153, 154.

4thly. For it might be his *own* Fiſh, or in his *own* Water, if Nothing appears to the Contrary. *ibid.*

On 12 *G.* 1. *c.* 34. §. 1. Of Journeymen Woolcombers for *combining* to raiſe their Wages, was quaſhed. 1166.

1ſt. In a Conviction, the Evidence muſt be *ſet out*, that the Court may judge of it; And it muſt be GIVEN *in the* PRESENCE *of the Defendant*, that He may have an Opportunity of *Croſs-Examination:* Whereas this is only that *T. E.* came before two Juſtices and depoſed "That "the Defendants *had confeſſed to* Him that they had "agreed *&c*;" Whereupon they appearing before the two Juſtices to anſwer the ſaid *Charge*, and having HEARD IT, and in the Preſence of the ſaid *T. E.* being called upon by the Juſtices to ſhew Cauſe why they ſhould not be convicted *&c*, and having Nothing to ſay or make out *&c*, Thereupon they are *convicted* for unlawfully entering into ſuch Combination. 1163 to 1167.

2dly. Here is *no Adjudication*; *only a mere Conviction:* They ought to have *gone on and* ADJUDGED *the Forfeiture*, even if the Penalty had been certain; but much more upon *this* Act, which gives a *Diſcretion* to commit either to the Houſe of Correction, or to the County Gaol, and for any Time not exceeding Three Months. *ibid.*

3dly. But another Objection, "that it was no Offence "within the Statute, becauſe they were not *formed in-* "*to unlawful Societies* abroad, nor was there any "*written* Agreement," was over-ruled. 1184.

On 18 *C.* 2. *c.* 2. 20 *C.* 2. *c* 7. and 32 *C.* 2. *c.* 2. for importing Butter into this Kingdom, *from Ireland*, was quaſhed, becauſe the Butter had been firſt exported from

from *Ireland* to *Liſbon*, and *from* LISBON hither. *Page* 1176.

Copies

Of *Proceedings*—are of two Sorts; *viz.* *Office* Copies, and *Cloſe* Copies:

1ſt. *Office* Copies, in the *ſame Court* and in the *ſame Cauſe*, are *equivalent to the Record* itſelf. 1179, 1181.

2dly. In *another Court*, or in *another Cauſe* in the ſame Court, the Copy muſt be *proved*. 1179.

3dly. Each Party in a Cauſe in Chancery, though He muſt take an Office-Copy of the adverſe Pleadings, may *read the* DRAUGHT *of his own*. *ibid.*

4thly. Copies to be *given in Evidence* in another Court may be written as *cloſe* as the Writer pleaſes. Thus the *Stamp-Acts* found it; And they did not mean to alter the Manner of making them, or to fix *them* to ſo many Words in a Sheet. They only meant to prevent any Fraud upon the Stamp-Duties, with Regard to the *Office* Copies: And the 64th Clauſe of 9, 10 *W.* 3. *c.* 25. (which Clauſe is intended to prevent Colluſion and Fraud) does not ſay a Word about *Copies*. 1177, 1181.

5thly. A *Cloſe* Copy of a Bill in Chancery, written on only *two* Sheets of Paper Each ſtampt with a triple Sixpenny Stamp only, was holden to be *properly ſtampt* ſo as to intitle the Plaintiff to have it *read in Evidence*; although it contained the Quantity of 40 Office-Copy Sheets. *ibid.*

6thly. So alſo was a like *cloſe* Copy of an amended Bill containing 44 Office-Copy Sheets, written on 3 Sheets of Paper Each ſtampt with a triple Sixpenny Stamp. *ibid.*

Copyhold.

Copyhold Land *mortgaged in Fee*, and become a *forfeited Mortgage* at Law, was *deviſed by the Mortgagee*, by *general* Words in his Will; but had been *particularly* deſcribed in the previous *Surrender to the Uſe of his Will*. The Deviſe was of *All* the Teſtator's Lands &c &c. (See the Words *pa.* 971, 972.) "to *H. W.* his Son *and Anne his* "*Wife*, and to the *Heirs of the Body* of the ſaid *H. W.* by "the ſaid *Anne*." By the Cuſtom of the Manor, intailed Copyhold Lands are *barrable by* SURRENDER. *H. W. alone*, WITHOUT *his Wife*, *ſurrendered* this mortgaged Land. Two Queſtions were made; 1ſt. Whether any Eſtate *Tail* was hereby *created*; 2dly. If there was, then whether *barred* by the Surrender of *H. W.* alone, *without* his Wife.

1ſt. *If* the Teſtator *meant* to deviſe this as *Land*, it ſhall *paſs as Land*: If as *Money*, then it ſhall paſs *as Money*. *ibid.*

2d. Here, He meant it to paſs *as a Debt*. *Page* 979.
3d. If it had paſſed as Land, and as intailed, yet it had been *well barred* by *this Surrender*. 979, 980. For
4th. Wherever Tenant in Tail of a *Freehold* could by *any* Means bear the Eſtate, there this Tenant in Tail of this Copyhold might do it by *Surrender*; And his Surrender ſhall *operate as a good Recovery*. *ibid*.

Corporation, Corporator.

Amotion. 731 to 736. See *Amotion*.
Books and *Records*—The Cuſtody of them. 766, 767. See *Books*.
Corporator—when obliged and when not obliged to *prove* his having *taken the Sacrament within a Year* next before his Election. 1015, 1016. See *Sacrament*.
A Corporate-Body conſiſted of 25 in all: There was a regular Summons; 21 met; *One Candidate only* was put in Nomination; 9 voted for Him; 12 did *not vote at all*; and 11 of the 12 formally *proteſted againſt going to any Election* at that Time, Conceiving the Office to be full of another Perſon (not in Fact regularly appointed;) but did not vote explicitly *againſt* Him, or *for any One elſe*: This Man was *well* elected, as *no Other* was put in Nomination, and the Election being once *entered upon*, could not be ſtopt 1020, 1021.

Coſts

How to be taxed, where the Defendant pleads *two Pleas* (by Leave, under 4, 5 *Ann. c.* 16.) on *One* of which, Iſſue being joined (and tried *firſt*,) a *Verdict* is found *for the Plaintiff*; and on the *other*, Demurrer being joined (and argued *after* the Trial,) Judgment is given *for the Defendant*. 753 to 756. See *Pleading*.
Of *Amendment* of a Plea, with Liberty to the adverſe Party, to *reply de novo*; in *what Manner* to be taxed, and *what Allowances* to be made. 758. See *Repleader*.
Of an Application for an *Information in Nature of a Quo Warranto*, "to ſhew by what Authority He claimed to "act as Capital Burgeſs and Alderman of *New Radnor*," were ordered to be paid by the Proſecutor to the Defendant; The Application being groundleſs and frivolous, and known to the Proſecutor to be ſo. 780.
A Rule by Conſent, "That *All Matters in difference* between "the Parties ſhall be tried in a *feigned Action*; and that "*the Coſts* ſhall abide the *Event* of the Iſſue;" was holden to take in Coſts on the *Crown* ſide, as well as the *Civil*; being made in a Cauſe on the *Crown*-ſide, and the Matters in difference being *Corporation-Rights*. 1022. (which Point had been before holden otherwiſe. 1221. *in margine*.)

SECU-

SECURITY *for anſwering* Coſts ſhall not be required of a *Scotch* Plaintiff reſident in *Scotland*, nor even of a *Foreigner*. *Page* 1026. *V. infra.* 1177.

To *Juſtices of Peace*, on groundleſs Complaints againſt them. 787, 788. and 1162. See *Information.* And in the laſt Caſe, the Rule was diſcharged *with* Coſts to the *Juſtices*, though *without* Coſts to the *Other* Perſons complained of. 1162.

SECURITY *for anſwering* them was required, in an *Ejectment*, of a Leſſor of the Plaintiff who lived in *Ireland*; though the Ejectment was brought under the Direction of the Court of Chancery, and a Security of 40 *l.* had already been given there. 1177. *V. ſupra* 1026.

A *Verdict* was ſet aſide *without* Coſts, (upon particular Circumſtances) 1224, 1228. See *Bill of Exchange.*

Where the Declaration conſiſts of *two Counts*; And the Defendant *demurs to One*, and *pleads to the Other*; and has Judgment FOR Him on the *former*, but a Verdict AGAINST Him on the *latter*; the *Plaintiff* is intitled to Coſts on his Verdict; the Defendant to None upon his Demurrer. 1232.

Covenant

By *two joint Leſſees*, if it be joint *and ſeveral*, ſhall *bind the Executors* of the *deceaſed* Leſſee; even though He *died before the Term commenced*, and the whole Term Intereſt and Benefit *ſurvived to the other* Leſſee. 1197.

Court

Eccleſiaſtical—Spiritual—813. See *Prohibition.*

Of *King's Bench*—The *Juriſdiction* of it is never taken away, unleſs by *expreſs* Words. 1042. See *Certiorari.*

Where Courts of *Law* and Courts of *Equity* are bound by the ſame Rules and muſt *determine alike.* 1108. See *Deviſe:* And ſee *ſupra* 479, 481.

Payment of *Money* into Court. 1120, 1121. See *Practice.*

Damages

MAY be *leſs* than the Declaration demands, but *not more.* 906 to 908. See *Policy of Inſurance.*

Where the *Court* will aſſeſs them *down to their giving Judgment.* 1081 to 1089. See *Gaming, Intereſt.*

Upon a *Writ of Error*, pro *Detentione Debiti*, after *Affirmance* of the Judgment—*how* to be recovered; and *how much.* 1096 to 1099. See *Intereſt.*

Debt—

Debt—

Mutual—See *Mutual Debts, Set-off, Statutes.*

Debtors—

Inſolvent. *Page* 747 to 749. See *Priſoners, Statutes.*

Declaration—

On a *Bill of Exchange*, in an Action by Indorſee againſt Indorſer, needs not ſet forth any Demand from the Original *Drawer*, or even any Endeavour to find him out. 677, 678. See *Bill of Exchange, Caſes denied.*

On a *Policy of Inſurance*—A Declaration for a *total* Loſs will ſupport a Verdict and Damages for a *Partial or Average Loſs.* 906 to 909.

The Plaintiff may recover *leſs* than He has laid; but *not more. ibid.*

Amendment of a Declaration in *civil* Actions, may be made at any Time whilſt All is in *Paper*; And the like in *penal* Actions, if the Amendment be at *Common* Law: But the *Statutes* of Amendment do *not* extend to *penal* Actions. 1098, 1099. See *Amendment.*

On a Policy of Aſſurance—containing *ſeven Counts:* The Court ordered Three of them to be *ſtruck out*; but without any Coſts, (becauſe juſtified by Precedents.) 1188, 1189.

1ſt. Plaintiff may recover an *Average* Loſs, on a Declaration for a *total* Loſs. *ibid.*

2d. Yet he ſhall have Liberty to declare *both* Ways. *ibid.*

3d. But where the Policy is *ſigned by the Defendant's Agent*, and not by Himſelf, it is *unneceſſary to declare doubly, viz.* Once on a ſigning by Himſelf, and again on a ſigning by his Agent; The better Way is to declare according to the Truth. *ibid.* Therefore the 3 firſt Counts, which alledged it to be ſigned by the Defendant Himſelf, were ſtruck out. *ibid.*

Deviſe.

No particular *technical Form* is neceſſary, to convey a Teſtator's Meaning; It muſt be collected from the *Scope* of the whole Will compared with its ſeveral Parts. The Court can not *make* a Will, or interpret it by an *arbitrary* Conſtruction; nor take into their Conſideration any *ſubſequent Alteration of Events.* 770, 771.

Suſannah Moſtyn, ſeiſed in Fee of Lands, had a Niece *Anne Lloyd*, her *Heir at Law*, married to Dr. *Wynn*. Prior to ſuch Marriage, *S. M.* (the Aunt) COVENANTED "That "She would, on the Solemnization of the Marriage, and "at the Requeſt &c, *at or after ſuch Time* as Dr. *W.* "ſhould ſettle *his* Eſtate to the ſame Uſes, *ſettle and convey* "&c.

" &c. to Truſtees &c, (naming them,) To hold &c, To " the Uſe &c." Part of the Uſes were to the Dr. for Life; Remainder to Truſtees &c; Remainder to *Anne* for Life; Remainder to the firſt and every other Son of their Bodies, and the Heirs of the Body of ſuch firſt and other Son &c; Remainder to their firſt and every other Daughter, and the Heirs of their Bodies &c; Remainder to the Uſe of the Aunt Mrs *S. M. her Heirs and Aſſigns for ever*. The Marriage took Effect. Afterwards, the Aunt made her WILL, (*Reciting the Articles*, and " that the Premiſſes " ſo *agreed* to be ſettled by Her are, after her Death and " the Deaths of Dr. *W.* and his Wife and in Default of " Iſſue of their two Bodies, limited *or agreed* to be limited " to Her and her Heirs;") and *deviſes the abſolute Inheritance thereof* " To the Uſe and Behoof of the HEIRS " OF THE BODY *of her ſaid Niece Anne Wynn by any* " OTHER *Huſband* lawfully to be begotten; and for want " of ſuch Iſſue, then to the Uſe and Behoof of her Nephew " CHARLES LLOYD and the Heirs of his Body; with " ſeveral Remainders over; Remainder to her own right " Heirs." The Aunt died ſeiſed, leaving the ſaid *Anne Wynn* her Heir at Law. Dr. *W.* and *Anne* his Wife entered, and regularly ſuffered a COMMON RECOVERY; in which They were vouched &c; And They afterwards declared the Uſes of this Recovery; the laſt of which was " to the *right Heirs of the ſaid* ANNE, for ever." And it was UNDER *the* HEIR AT LAW *of the ſaid* ANNE WYNN, that *Goodman et al'* (the Defendants below) claimed, Dr. *Wynn* and his Wife *Anne* being Both *dead without Iſſue*. The *Leſſors* of the Plaintiff below were *Annabella*, the *only Daughter and Heir* of CHARLES LLOYD, and her Huſband. *Page* 874 to 879.

1ſt. The Queſtion depends upon the *Intention* of the Teſtatrix, " Whether She meant to give *Charles Loyd* an *Eſtate* " IN POSSESSION, or not." For *if She did not*, neither He nor thoſe claiming under Him can have any Title. 877: Becauſe the Deviſe to Him could not be good any other Way than either as a *contingent Remainder* or as an *Executory Deviſe*; And it is *not good*, in *either* Way. 877, 878.

2d. It is NOT *a* PRESENT Deviſe: For neither the *Words* nor the *Nature of the Proviſion* will admit of *this* Conſtruction. *ibid.*

3d. It is a FUTURE Deviſe, to take Place after an *indefinite* Failure of Iſſue: Which is *too remote*, as it far exceeds the utmoſt Limits allowed to Executory Deviſes, namely, the Compaſs of a *Life or Lives in being*, and 21 *Years after*, 878, 879.

4th. The *Articles* can not be conſidered as EXECUTED. (Yet this was not given as a direct Opinion.) 879.

5th. An Executory Deviſe too remote in its *Creation* cannot be made good by any ſubſequent *Event*. 878.

Thomas

Thomas Herbert Eſq; ſeiſed in Fee, deviſed to his *Wife Elizabeth* (after Payment of his juſt Debts) "All his Money "Plate Jewels Houſhold-Goods and Furniture where-"ſoever, and all his Goods and Chattels and perſonal Eſ-"tate, *Real or Perſonal*, whatſoever and whereſoever that "ſhould be in his Poſſeſſion or He ſhould be any ways "intitled unto at the Time of his Deceaſe." Then the Will goes on thus—"And I further give deviſe and be-"queath to my ſaid dear Wife, *and her Heirs*, SUCH "PART OF ALL MY REAL ESTATE THAT I HAVE ANY "POWER TO DISPOSE OF BY THIS MY WILL. And I "*further* give deviſe and bequeath to my ſaid Wife, *out of* "*the* OTHER REMAINING *Part* of my ſaid Real Eſtate, "for her better Support and Maintenance till my Son "*Thomas* attain the Age of 21 Years, the Sum of 400*l. a* "*Year.* And my Will is, That the ſeveral Bequeſts and "Deviſes to my ſaid Wife as aforeſaid ſhall not nor are "intended to *prejudice* my ſaid Wife in her *Thirds or* "*Dower* out of my ſaid Real Eſtate." The Teſtator died ſeiſed. *Elizabeth* afterwards, by *Deed*, conveyed this Eſtate to *Truſtees*, to ſeveral Uſes, with Remainder to ſuch Uſes and to the Uſe and Behoof of *ſuch Perſon or Perſons*, and for ſuch Eſtates Intents and Purpoſes as She, by any Deed or Deeds to be by Her executed in the Preſence of 2 or more credible Witneſſes, or by her laſt Will in Writing, or ANY WRITING PURPORTING TO BE HER WILL, ſigned and publiſhed in the Preſence of 3 or more credible Witneſſes, whether *covert* or ſole and *notwithſtanding her Coverture*, ſhould LIMIT *or* APPOINT; and for Want of ſuch Limitation or Appointment, to the Uſe and Behoof of her own Heirs and Aſſigns for ever. Then She duly made a Will or a *Writing purporting to be her Will*, whereby She *deviſed* all her Real and Perſonal Eſtate to her Son *Thomas Herbert* and his Heirs and Aſſigns for ever; CHARGING her Debts Legacies and Funeral Expences *thereupon*. She was COVERT of a ſecond Huſband, when She made this Will or Writing: And her ſecond Huſband *ſurvived* Her, *Thomas* her Son was *Heir at Law* to Her and *alſo to her firſt Huſband*, being their only Child. This *Thomas the Son* died an *Infant*, *inteſtate*, WITHOUT *Iſſue*, and *unmarried*.

1ſt. The Eſtate *paſſed to Elizabeth in* FEE, by the Will of *T. H.* her Huſband: For He manifeſtly *intended* to give Her *All that was in his Power* to give. *Page* 882.

2d. *Thomas the Son* did *not* take the Eſtate from his Mother by *Purchaſe*, but *by* DESCENT. *ibid.*

3d. Conſequently, upon his Death, it deſcended to his Heirs *ex parte* MATERNA, and not to his Heirs *ex parte paterne*. *ibid.*

Audley Mervin Eſq; deviſed to his Wife *Olivia* and *her Heirs* certain Town Lands and Tenements in *Tyrone* and *Meath*, and alſo *all other* his Lands Tenements and *Hereditaments* in the ſaid Counties or Either of them; to the Uſe and Purpoſe that She might, *by Sale* of ſuch of the ſaid Lands

&c.

&c. raiſe ſo much Money as ſhould be ſufficient to diſcharge ſuch of his DEBTS as ſhould not be diſcharged out of his perſonal Eſtate: And as to ſo much Part of the ſaid Lands and Tenements as ſhould *remain unſold*, To the Uſe of his Son *Audley Mervyn*, in Tail Male; and ſo to his three other Sons in Tail Male; with ſeveral Remainders over. The Will referred to an Eſtate ſettled upon his Eldeſt Son *Henry*, on his Marriage, with the Reverſion in Fee to the Teſtator; and gave an Annuity to his ſaid Wife *Olivia*, out of the deviſed Lands, and ſeveral Powers of Leaſing, Jointuring, and committing Waſte; and contained ſeveral Clauſes which it would be tedious to particularize. The two Queſtions upon this Will were, 1ſt. Whether the REVERSION *of the ſettled Lands* paſſed by it, or not: 2d. *If* it *did paſs*, then whether the Leſſors of the Plaintiff, who *claimed under thoſe in Remainder*, (the four Sons being All dead without Iſſue,) had *any Title*. *Page* 912.

1ſt. The Court were unanimous, upon the firſt Queſtion (which went to the Fundamental Merits,) That the REVERSION *did* NOT *paſs* by the Will; as appeared upon the *whole Tenor and Complexion* of the Will, conſidered in *all its Parts* and *taken all together:* Which is the Way to diſcover the *Intention* of the Teſtator; and which ſhall be equally regarded, if it can be *clearly and plainly collected from the Will*, as if it had been directly expreſſed. 920, 923, 924.

2dly. As the Reverſion was holden NOT *to paſs*, by the clear *Intention* of the Teſtator, the Court thought it unneceſſary to give any Opinion "whether the Deviſe over "could *take Effect*, *in Point of* LAW; which depended "upon *nice Queſtions of Law*. 918, 923, 924.

By Mortgagee, of LANDS HOLDEN in MORTGAGE. 969 to 980. See *Copyhold. Mortgage.*

Deviſe "that the *Executors ſhall ſell* the Teſtator's Land for "the Payment of his Debts," does *not*, in general, *paſs the Eſtate* to the Executors. 1030, 1031.

Deviſe "*that his Executors ſhall and may* ABSOLUTELY SELL "*mortgage or otherwiſe diſpoſe of his Freehold Eſtate*, for "the Payment of ſuch Debts Legacies and Funeral Ex-"pences as his Leaſehold Eſtate ſhould not be ſufficient "to diſcharge," is ONLY *a* POWER *to ſell &c:* And NO ESTATE *paſſes* to the Executors. *ibid.* and 1032.

"To the poor Priſoners and inſolvent Debtors in the MAR-"SHALSEA-*Priſon* in the Burrough of *Southwark*—" means the Priſon of the *Palace Court*, not of the *King's Bench*. 1038, 1039.

"To my dear Wife," of his Farm at *B. in the Tenure of J. S.* "ſubject to her Diſpoſal in *as full and abſolute a Manner* "as I could diſpoſe of the ſame if living"—*paſſes* to the Wife, as well ſuch *Woods and Woodlands Hedge-Rows Timber*

ber and Trees, as ſtood EXCEPTED out of the Leaſe to the Tenant, and were OCCUPIED *by the Teſtator Himſelf*, as the Reſt of the Farm; as it appears to be his *Intention*, upon the Whole of the Will, to give *All* his Eſtate to his Wife: And the Words "*in the Tenure of J. S.*"—are not intended as a *Reſtriction*, but as an *additional Deſcription*. *Page* 1089 to 1095.

Of *Gavelkind* Land, in four Parts, all in the ſame Words, to the Families of the Teſtator's four Nephews and Nieces, *viz.* a living Nephew, a deceaſed Nephew, and two living Nieces. The Deviſe in queſtion was—"Alſo I give and "deviſe One other equal undivided fourth Part &c. unto "my Niece *Anne*, now Wife of *William Corniſh*, and to "the HEIRS OF HER BODY lawfully begotten, or to be "begotten, *as well* FEMALES as Males, and to THEIR "HEIRS AND ASSIGNS FOR EVER, to be divided *equal*-"*ly* Share and Share alike *as Tenants in Common* and not "as *Joint Tenants*." The laſt preceding Deviſe was to his Niece *in Law, Grace Read*, WIDOW *of his* LATE *Nephew Edward Read* DECEASED, and to the Heirs of *her* Body &c. (in the very *ſame* Words.)

Reſolved

1ſt. The INTENTION of the Teſtator is the Rule of conſtruing Deviſes, *provided* it be not inconſiſtent with the Rules of Law. 1106 to 1114.

2d. Such Intention ſhall be *effectuated*, where no *Rule of Law* prevents it. *ibid.*

3d. But it cannot prevail *againſt* the ſettled Rules and Maxims of Law. *ibid*

4th. There is *no* ſuch *fixed invariable* Rule, as "That "*Words of Limitation* ſhall NEVER in *any* Caſe be con-"ſtrued as Words of Purchaſe." *ibid.*

5th. For in *ſome* Caſes, they may be conſtrued Words of Purchaſe, either upon a *Will* or upon a *Deed*. *ibid.*

6th. In the preſent Caſe, The *Heirs of the Body* of *Anne Corniſh took as* PURCHASERS. *ibid.*

1ſt. They could take *no other* Way. 1109, 1111.

2d. The Teſtator could not mean that *Anne Corniſh* ſhould take either as Tenant in *Tail*, or a *Fee* jointly with her two Daughters in *Thirds*, as Tenants in Common; or that the *Widow of his deceaſed Nephew*, (whoſe Deviſe is in the like Words,) ſhould take an equal Share of the *Inheritance* with his *natural* Relations; or that this one Fourth ſhould go in a *Courſe of Deſcent in Gavelkind*: He meant that *Anne Corniſh* ſhould take an Eſtate for *Life* only. 1110 to 1114.

3d. He intended that the *Children* of his Nephews and Nieces ſhould take *Inheritance in Fee Simple*, both Males and Females, *per Capita*, as Tenants in Common: And this is a legal Intention. 1112.

7th. The ancient Maxim of the Law was, "That although "the Eſtate be limited to the Anceſtor expreſly *for Life*, "and after his Death *to his Heirs* (general or ſpecial,) "yet the *Heir* ſhall take *by Deſcent*, and the Fee ſhall "veſt in the *Anceſtor*." *Page* 1106.

1ſt. This Maxim was *originally introduced* in *Favour of the Lord* (to prevent his being deprived of the Fruits of the Tenure,) and likewiſe for the ſake of *Specialty-Creditors*. *ibid.*

2dly. The *Reaſon* of it has now *ceaſed*. 1107.

3dly. Yet, having become a Rule of Property, it is adhered to in all Caſes *literally* within it. *ibid.*

4thly. But where there are Circumſtances which take the Caſe OUT *of the Letter* of this Rule, it is departed from, in Favour of the *Intention*. *ibid.*

8th. There is *no ſolid Diſtinction* (as to the Point in queſtion in this Caſe) between a TRUST and a LEGAL *Eſtate*, or between a *Truſt* EXECUTED and a *Truſt* EXECUTORY. 1108.

1ſt. A *Court of* EQUITY is as much *bound* by *poſitive Rules* and *general Maxims* concerning Property as a Court of *Law* is. *ibid.*

2dly. If the *Intention* of the Teſtator be *contrary to the Rules of Law*, it can no more take place in a *Court of* EQUITY, than in a Court of *Law*. *ibid.*

3dly. On the other hand, if the Intention *be not contrary to Law*, a *Court of* COMMON *Law* is as much bound to conſtrue and effectuate the Will *according to that Intention*, as a Court of Equity can be. 1108, 1109.

John Selwyn the Elder being Tenant for Life, with Remainder to *John Selwyn* his Son in Tail Male, They both joined in a Bargain and Sale to *J. W.* and his Heirs, to the Intent he might become Tenant of the Freehold, to the End a Common Recovery might be ſuffered To the Uſe of the ſaid *J. S.* the Elder for Life *&c.* Remainder to the Uſe of the ſaid *J S.* the Younger his Heirs and Aſſigns for ever. A Writ of Entry was ſued out, returnable (as is expreſly ſtated) "in 15 Days from the Holy *Trinity*, *which was the 16th Day of June* 1751." *Trinity* Term 1751 begun on *7th* of *June*. On the 8th of *June* 1751, *John Selwyn* the Younger made his Will, and died on the 27th without altering it or *republiſhing* it. Queſtion, "Whe-"ther the ſeveral Lands Tenements and Hereditaments "comprized in the Deed of Bargain and Sale (which "was dated on 12th of *April* 1751,) PASSED *by the* "*Will of John Selwyn the Son*." The Court of King's Bench certified their Opinion to the Court of Chancery, "That they DID paſs thereby." 1134.

Diſcontinuance.

A Fine *with* Proclamations (as well as a Fine at Common Law, *without* Proclamations,) levied by Tenant in Tail in

in Poſſeſſion, will *deveſt the Reverſion* in Fee, as well as *diſcontinue the Remainder* in Tail, (ſo as to put the Reverſioner or Remainder-Man to his *Formedon.*) *Page* 711 to 715.

Deeds of Leaſe and Releaſe dated 26th and 27th *January*, with a Covenant in the Releaſe "to levy a Fine," and a Fine levied accordingly, *afterwards*, but in the ſame *Hilary* Term, and *after the Marriage* in Conſideration whereof this Settlement was made; ſhall be *All taken together*, as ONE *and the* SAME *Aſſurance*. 714, 715.

1ſt. The *Operation* of the Deeds and of the Fine ſhall *not be divided* and conſidered *diſtinctly*: For this would *defeat the Intention* of the Parties, and *overturn* all Family-Settlements. 710 to 716.

2d. The Deeds were *incomplete* and *only executory*, till the Fine was levied: And they operate as a *Declaration of Uſes*; which Uſes ariſe *out of the Fine*. 712, 715. And the *Eſtate paſſes by the Fine*. 713, 714.

3d. This Caſe is quite different from *Seymour*'s Caſe 10 *Co.* 95. For there *Henry Cheyny* did not levy the Fine till near a *Year after* the Bargain and Sale: And *Higham* was expreſsly found to have *entered* and been *ſeized by Force of the Indenture* of Bargain and Sale: So that the Bargain and Sale were, in that Caſe, totally *unconnected* with the Fine. 713, 714, 715. Nor does it there appear, that any Fine was *intended* to be levied, at the *Time* of executing the Deed of Bargain and Sale. 715.

Diſfranchiſement. See *Amotion.*

CAUSE *of Amotion—Bankruptcy* (alone) is *not* ſo. 731 to 736. See *Bankruptcy*.

When an Amotion is returned, the Return muſt ſet out the *particular Facts*, preciſely: It is not ſufficient to ſet out the *Concluſions* only. And it muſt, in the ſame Manner, ſet out the *Cauſe* of Amotion. 731.

If a *ſelect* Number of a Corporation, (the Common Council,) having Power by their Charter to amove for reaſonable Cauſe, do meet upon a *Day not directed by their* Charter for a Day of Meeting, and do then amove One of their Members, without previous *Notice* to Each of *themſelves* and alſo to *Him*, He ſhall be reſtored. 731 to 736.

1ſt. There muſt be a previous *Summons*, either *general* or *ſpecial*, to each *Conſtituent* Member. *ibid.*

2dly. And alſo to the *Perſon to be amoved*, with *Notice* of the particular *Charge* to be made againſt Him. *ibid.*

3dly. It is not ſufficient to alledge, generally, "That the "ſelect Body were *duly*, or in *due manner* aſſembled:" It ought to be *expreſsly* alledged, "That they were "*All of them ſummoned*." 731, 733.

4thly. Such a *general Allegation* needs not therefore to be traverſed. *Page* 731, 733.

If the *whole* Body of a Corporation meet upon a Day NOT *a Charter* or *Preſcription-Day*, and amove a Member, it is as neceſſary that *Each* individual Member ſhould be ſummoned and have *Notice* of the *particular Buſineſs* intended to be proceeded upon, as it is in the Caſe of a *ſelect* Number. 741 to 745. *V. ſupra, the laſt Caſe.*

Previous Conviction at Common Law—Where neceſſary; where not neceſſary; is a Point *not ſettled*; (as was alledged, *arguendo:*) See it diſcuſſed, *arguendo*. 742 to 745. *Sed v. Supra, pa.* 538, 539.

Ejectment.

THE *Nominal* Plaintiff, and the *Caſual* Ejector are *judicially* to be conſidered as the *fictitious Form* of an Action *really* brought by the *Leſſor* of the Plaintiff againſt the *Tenant in Poſſeſſion*. 667, 668.

This Action is an Invention for the *Advancement of Juſtice*, and to force the Parties to go to Trial upon the *Merits*. *ibid*

The Leſſor of the Plaintiff, and the *Tenant in Poſſeſſion*, are, ſubſtantially and in Truth, the only *Parties* to the Suit. *ibid.*

There is *no Diſtinction* between a Judgment in Ejectment upon a *Verdict*, and One by *Default:* In the former, the Plaintiff's Right is found; in the other, confeſſed. *ibid.*

An *Action* for the *meſne Profits* may be brought either in the *Name* of the *Leſſor* or the *Leſſee:* It is equally the Action of the *Leſſor* or the Plaintiff. *ibid.*

The *Tenant* is *concluded* by the Judgment; and can *not controvert* the Plaintiff's *Title* nor *Poſſeſſion*. *ibid.* But the Judgment proves Nothing *beyond the Time laid* in the Demiſe. *ibid.* It proves Nothing as to *Length of Time the Tenant has occupied*; nor as to the *Value:* Both theſe muſt be *proved*, in an Action for the *meſne Profits*. *ibid.*

A *Landlord* was *made Defendant*, according to 11 *G.* 2. *c.* 19. §. 13. on the *Tenant's Non*-Appearance; and entered into the Common Rule; and thereupon, a *Stay of Execution* againſt the Caſual Ejector was ordered, until the Court ſhould make *further Order*.

1ſt. A *Writ of Error* brought by the Landlord, is a ſufficient Reaſon againſt taking out Execution. 757.

2dly. But the *proper Opportunity* for the Landlord to make his *Stand* againſt the Execution is by ſhewing this as *Cauſe* againſt the Plaintiff's Motion *for Leave* to make it out. *ibid.*

3dly. If He *omits this Opportunity*, the Execution (regularly iſſued) ſhall *not* be ſet aſide. *ibid.*

Ancient

Ancient Demeſne may be pleaded in Ejectment, by *Leave*, and upon proper Affidavit. 1047, 1048. But the Court will not ouſt themſelves of Juriſdiction, in Favour of ſo wild and ſtrange a One, without a very ſufficient Affidavit. *Page* 1048. See *Ancient Demeſne*.

If the Tenant in Poſſeſſion ABSCONDS, The Court will, upon Service of his *Niece*, the only Manager of his Houſe and reſident in it, and *fixing up* another Copy on the Premiſſes, make a Rule to ſhew Cauſe why Judgment ſhould not be entered up againſt the Caſual Ejector; and will further order "That Notice of ſuch Rule to *any* Perſon "in the Houſe be ſufficient; or if no Perſon be in the "Houſe, then to be *affixed to the Door &c.*" 1116. *V. infra* 1111.

AMENDMENTS in Ejectment are carried *much further* than formerly. 1161, 1162.

1ſt. A *Verdict* cures a *Defect in ſetting out* the Title; though it can not cure a *Defective Title*. *ibid.*

2d. *After Verdict*, if the Objection be grounded upon the *mere miſtake of the Clerk*, or a *trifling Nicety*, there is *no Need of any* ACTUAL *Amendment* at all: The Court will *over-look* the Exception. *ibid.*

Proceedings were ſtayed till the Leſſor of the Plaintiff ſhould give *Security for the Coſts*, his Reſidence being in *Ireland:* Although this Ejectment was brought under the Direction of the Court of Chancery, and 40*l.* Security had been already given there. 1177.

Tenant in Poſſeſſion was *perſonated* at the Time of Service by Another who accepted the Service in her Name: The Court made a Rule to ſhew Cauſe "why this ſhould "not be *deemed good Service upon the Tenant Herſelf*; and "why Judgment ſhould not be ſigned againſt the Caſual "Ejector, on Default of *her* appearing; And that leaving a Copy of this Rule *at her Houſe with ſome Perſon "there*, or (if No One to be met with) *affixing it on the "Door*, ſhall be *good Service* of it." This Rule was made abſolute, on a proper Affidavit. 1181, 1182. *V. ſupra, pa.* 1116.

The Court will make a like Rule (with a *Retroſpect*) upon Service of a Copy of the Declaration in Ejectment on a *Servant* in the Houſe of an *abſconding Tenant in Poſſeſſion*, or of One who *keeps out of the Way* to prevent being ſerved. *ibid. V. ſupra, pa.* 1116.

Election.

A Perſon who has brought a *Civil* Action for an Injury, ſhall not be ſuffered to proceed *criminally*, by Way *of Information*, at the ſame Time; but ſhall *directly* make his Election "in which Method He will proceed," before the Court will *enter* into the Criminal Complaint. 720 to 723. See *Information*.

Error.

Error.

In Treſpaſs *vi et armis*, for an Aſſault and Battery; Defendant pleads "not guilty," as to the Force and Arms; And *Iſſue was joined* thereon. As to the Special Damages which were laid, He pleaded "*Son Aſſault demeſne:*" To which the Plaintiff replied, "*De injuria ſuâ propriâ, abſque tali Cauſa*;" On which, *Iſſue was likewiſe joined.* The Verdict finds the Defendant *generally* "Guilty of the "TRESPASS within written." Judgment affirmed. *Page* 698 to 701.

For, *Verdicts* are to be taken *favourably*; not ſtrictly: And if the Court can *collect* the *clear Intention of the Jury*, they will mold them into *Form*, and make the Verdict ſerve, notwithſtanding the Irregularity of *Wording. ibid.*

Bail (on bringing a Writ of Error) muſt be given (by 3 *J.* 1. *c.* 8.) in Actions of *Debt upon ſingle Bond*, or upon Obligation conditioned for *Payment of Money only*, or *Debt for Rent*, or upon *any Contract* ſued in the Courts of *Weſtminſter*, Counties Palatine, or Great Seſſions.

1ſt. A Bond given by a *third* Perſon, to third Perſons, as a Collateral Security for a Debtor's paying his Creditors 15 *s.* in the Pound, upon a liquidated Total of his Debts, is a Bond with Condition for Payment of *Money only*, within that Act. 746, 747.

2dly. Its being payable by *Inſtalments*, makes *no* Difference. *ibid.*

Brought by the *Landlord* made Defendant under 11 *G.* 2. *c.* 19. §. 13. muſt be *ſhewn for Cauſe*, againſt a Motion for Leave to take out *Execution againſt the Caſual Ejector*: Otherwiſe, the Execution ſhall not be ſet aſide. 757. See *Ejectment.*

Lies not from the Courts of the City of *London*, to *B. R.* Though it does lie thither, from all *other Corporation-Courts.* 777.

Coſts and *Damages*, upon *Affirmance* of the Judgment—*how to be recovered*; and *how much.* 1096, 1097. See *Intereſt.*

Evidence

Of having *taken the Sacrament within a Year* next before Election into a Corporate-Office—When neceſſary to be given; when not. 1015, 1016. See *Sacrament.*

Execution—

Sued out *above a Year after Judgment obtained*, muſt have a previous *Scire facias* to revive it; in order to prevent a Surprize upon the Defendant. But this Rule does *not hold*, where the *Defendant* has Himſelf *effected the Delay*: So far from it, that the Defendant's Rule "to ſhew "Cauſe

"Cauſe why ſuch an Execution ſhould not be ſet aſide," was diſcharged even with *Coſts*. *Page* 660.

A Capias ad ſatisfaciendum made returnable at a Day which falls *out of Term*, would *not be void*, though (liable to be ſet aſide on Motion;) Nor can ſuch a Defect in it be taken Advantage of by *Bail*, upon a *general Demurrer to a Scire facias* brought againſt them. 1187, 1188.

Factor.

IF a Factor *knowing* the Circumſtances of his Principal to be *deſperate*, and *believing* that he muſt *break* unleſs He can procure Credit, *advances Money* upon his Bills, *to ſave him from immediate Failure*, This is NO *Fraud*. 940.

Fiction of *Law. V. Teſte, Relation, Pleading, Evidence.*

Where the Truth of the *Fact* may be *averred* againſt it. 911 to 932.

Fraud.

If a *Factor*, *knowing* the Circumſtances of his Principal to be *deſperate*, and believing that He muſt *break* unleſs He can procure Credit, *advances Money* upon his Bills, *to ſave him from an immediate Failure*, This is *no* Fraud. 940.

Freedom

Of a *Corporation*.—See *Corporation*, *By-Law*, *Mandamus*.

Freight.

The Defendant ſhipped a Cargo of Fiſh on Board the Plaintiff's Ship, to be carried from *Newfoundland to Liſbon*: The Plaintiffs had alſo a Cargo of Fiſh of their own, on Board. The Ship had proceeded 17 Days on her Voyage, and was TAKEN within 4 Days Sail of *Liſbon*. It was retaken within 3 Days, and brought into *Biddeford*. The Plaintiffs, having inſured the *Ship* and *their* Part of the Cargo, ABANDONED *Both* to the Inſurers. The Defendant had his Goods of the Recaptors, and paid them 5 *s. per* Quintal Salvage, at the Rate of 10 *s. per* Quintal Value: (The prime Coſt was 10 *s.* 6 *d. per* Quintal) the Fiſh could not be ſold in *England*, for more than 19 *s. per* Quintal, clear. The Defendant ſent it to *Bilboa*, where it was ſold. 883.

1ſt. If a freighted Ship becomes *diſabled* on its Voyage, *accidentally and without any Fault* of the Maſter, the *Maſter has his* OPTION, either to *refit* it (in convenient Time,) or to procure *another* Ship to carry the Goods. If the Freighter diſagrees to this, and will not ſuffer it, the Maſter ſhall yet be intitled to his WHOLE Freight, as of the *full* Voyage. *Page* 887, 888.

2d. But the Maſter (if in no Fault) is, at *all* Events, and *though* He neither refits his own Ship nor procures another, intitled to Freight PRO RATA ITINERIS, i. e. *in Proportion to ſuch former Part* of the Voyage as He has *already* performed. 888 to 891.

3d. In this Caſe, He had performed $\frac{17}{21}$ Parts of it: And therefore $\frac{17}{21}$ of the whole Freight had been the *rateable Proportion*, had the whole Cargo been ſaved. 888.

4th. But here was *Salvage* paid for *Half*: Therefore *Half* muſt be conſidered *as loſt*; and *Half* as *ſaved*. Conſequently, the *rateable Proportion* is $\frac{17}{21}$ of *Half* of the full Freight. 888, 890.

5th. The *Value* of the Goods, or what they ſold for, or whether they are ſpoiled or not, was Nothing to the Maſter; becauſe the Freighter *took* them; And He muſt take *All* that are ſaved, *or None*: But the Maſter had *earned* his Freight by carrying them. 887, 888.

6th. *If* He had *abandoned all*, He had been *excuſed* Freight. *ibid.*

7th. The Maſter is not bound to *deliver* the Goods, *till* AFTER *He is paid* his Freight. 890.

Gaming.

Action upon the Caſe on ſeveral Promiſes: 3 Counts; 1ſt. upon a *Bill of Exchange* drawn *at* PARIS, by the Inteſtate Sir *John Bland*, upon *Himſelf* in ENGLAND, for 672*l.* payable to the Plaintiff's Order, *ten Days after Sight*, Value received, and accepted by Sir *John Bland*; 2d Count—for 700 *l. lent* and advanced by the Plaintiff to Sir *John Bland*; 3d Count—for 700 *l.* had and received by Sir *John*, to the Plaintiff's Uſe. General Iſſue. Verdict for the Plaintiff, for 672*l.* Damages, ſubject to the Opinion of the Court, on the following Facts proved and admitted: *viz.* The *Bill of Exchange* was *given at* PARIS for 300*l.* there LENT by the Plaintiff to Sir *John*, at the *Time and Place of Play*; and for 373*l.* more LOST at the *ſame Time and Place*, by Sir *John* to the Plaintiff, at Play. But the Play was very *fair*; and *no Imputation* on the Plaintiff's Behaviour: And ſeveral other Perſons of Faſhion were then and there at Play. That Sir *John* and the Plaintiff were *both Gentlemen*. That *in* FRANCE, Money LOST at *Play*, between *Gentlemen*, may be *recovered*, as a Debt of *Honour*, before the MARSHALS OF FRANCE; Who can enforce Obedience to their Sentences, by *Impriſonment*: Though ſuch Money is *not recoverable*

coverable in the ORDINARY Courts of Juſtice there. That Money LENT *to play with*, or at the *Time and Place of Play*, may be *recovered* there, as a *Debt*, in the ORDINARY Courſe of Juſtice; there being *no* Poſitive Law *againſt* it. *Page* 1377, 1078. Queſtion "Whether the "Plaintiff is intitled to recover *any* Thing, and WHAT, "againſt the *Adminiſtratrix* of Sir *John*." *ibid.*

Reſolved

1ſt. That the Plaintiff can *not* recover UPON *this Bill of Exchange*, by Force of the WRITING; it being a VOID SECURITY, both in *France* and in *England*, as being for a Gaming Debt. 1078, 1079.

1ſt. The Parties had an expreſs *View to the Law of* ENGLAND; and the *Payment* was to be in ENGLAND, and not till ten Days after Sight *in* ENGLAND; And the Plaintiff has appealed to the Laws of ENGLAND: Therefore the Laws of ENGLAND muſt *govern* and be the *Rule* of Determination. 1078, 1081, 1082, 1083, 1084.

2dly. But the Laws of *France* and *England* are Both the *ſame* as to the Money WON: The Contract is *void* as to THAT, by the Laws of *both* Countries. It could not be recovered in any *ordinary* Court of Juſtice there, notwithſtanding the Bill of Exchange: And the Remedy in this *extraordinary* Juriſdiction before the *Marſhals* (which even the Parliament of *Paris* would Pay no regard to) is only *in* PERSONAM, in its *utmoſt* Extent; but can not be extended againſt the ADMINISTRATRIX; nor indeed could they have taken Cognizance of *this* Matter, had Sir *John* been living. 1079, 1080, 1083.

2d. But the CONTRACT is *good*, as far as relates to the Money LENT at this Time and Place of Play; and *remains ſo*, notwithſtanding the Security's being bad and void for the *Whole*: For the CONTRACT is *diviſible*, but the *Security* is *not*. The *Security*, being entire, is bad for the *Whole*: But the *Contract* remains good for that *Part* which aroſe upon a *good* Conſideration. 1081, 1082, 1084, 1085.

1ſt. As to the 300 *l. fairly and bonâ fide* LENT, at the Time and Place of Play in *France*, (and not ſtated to be lent to *play with* or for the *Purpoſe of Play*,) the *Contract* remains *good*. *ibid.*

2dly. The Words "*Contract and Contracts for the ſame*," are not in 9 *Ann. c.* 14 (as they are in 16 *C.* 2. *c.* 7. §. 2.) and were probably *left out deſignedly*. 1081, 1082. And, *per Wilmot* Juſtice, the 9 *Ann* does not mean to make the Contract void, where the Money is *fairly and bonâ fide lent*. 1082.

3d. INTEREST for the 300 *l. lent* ſhall be allowed to the Plaintiff. 1084, 1085.

1ſt.

1ſt. *From* the Time when the Money was payable. *Page* 1085.
2dly. *To* the Time of liquidating the Debt by the Court's *giving the Judgment.* 1081, 1085, 1083, to 1089.
1ſt. This is agreeable to *natural Juſtice.* 1081, 1086.
2dly. And to *Law*, both *Statute* and *Common.* 1086, 1087.
3dly. And to the Practice of the Court of *Chancery* and of *all other Courts.* 1087.

Grand Jury

Ought not to conſiſt of more than 23 actually ſworn upon it. 1088.

Habeas Corpus.

FOR a PRISONER OF WAR taken on Board of an Enemy's Privateer Ship, and alledging and proving by Affidavit, "That He was a *Foreigner*, Subject of a "*Neutral* Power, taken by a *French* Privateer, in an "*Engliſh* Ship as He was coming to *England* to enter "into our *Engliſh* Merchant's Service, and detained *by* "*Force* and *againſt his Will* to ſerve on Board the *French* "Privateer"—*This Court* will not take upon themſelves to ſet Him at Liberty: The Application muſt be to the *Crown.* 765, 766.
A Perſon *extremely weakened* in Body and Mind being got into bad Hands, and *too infirm* to be brought into Court by *Habeas Corpus*, a Rule was made, in the firſt Inſtance (without Time to ſhew Cauſe) for a Doctor, Apothecary, Nurſe, Relations and Attorney to have *Acceſs*, to adviſe and aſſiſt Her. 1099, 1100.

Habeas Corpus *cum* Cauſa. See *Procedendo.*

When to be *delivered* (purſuant to 21 *J.* 1. *c.* 23. §. 1, 2.) 759. See *Statutes.*
A *By-Law* ſhall not be objected to, in a *ſummary* Way, upon *Motion*, on the *Return*; *except* in Caſes from LONDON. 779. In all *other* Corporations, the Plaintiff muſt *declare here:* and if the Defendant has any Objection to the By-Law, He may demur. *ibid.* And this, though the By-Law has *negative* and *excluſive* Words, "that the Action "for the Penalty ſhall be brought in the Corporation "Court, and *not elſewhere.*" *ibid.*

Heriots

Are *not aſſeſſable* to the *Poor*-Rates. 991, 992. See *Manor*, *Statutes* (43 *Eliz. c.* 2. §. 1.) *Quit-Rents.*

High-Bar Money

Is the Money paid to the *Box* upon *certain* Motions in Court, *every* Day, (as for Judgment, for Writs of *Certiorari*, *Mandamus*, *Habeas Corpus*, and other original Writs,) and upon *all* Motions on the *laſt* Day of a Term; and alſo upon all *Affidavits* ſworn in Court. *Page* 867.

It does *not* belong to the *Priſoners*: *ibid.* But hath been conſtantly paid by the Secondary of the Plea-Side, to the Clerk of the Junior Judge of the Court; to be paid over to all the four *Judges* of the Court, equally; to be diſpoſed of *by Them* for ſuch CHARITABLE PURPOSES as *They* in *their* Diſcretion ſhould think proper. *ibid.* and 868.

High-Way—

Sending *Men and Teams*, to mend them, ſix Days according to 22 *C.* 2. *c.* 12. §. 9. 832 to 835. See *Indictment.*

Hoſpitals—

Rateable, or not, to *Poors* Tax, *Window* Tax, *Land* Tax, *&c.* 1053 to 1066. See *Orders.*

Indictment.

WHERE a *Statute* CREATES *a* NEW *Offence*, and appoints a *particular Method of Proceeding*, that ſpecific Method muſt be *purſued*, and *no Other*: But where it was an Offence antecedently *puniſhable* BEFORE *the Statute*, and the Statute preſcribes a *particular ſummary Remedy*, There EITHER Method may be purſued, *viz.* the *ſummary* Remedy, *or* an *Indictment at Common* Law; becauſe the particular Remedy is CUMULATIVE, and does *not* take away the former Remedy. 803 to 806. *V. ſupra* 545.

Therefore an Indictment *lies* for *Diſobedience to an Order of Seſſions*; becauſe it is an Offence indictable at Common Law: *ibid.*

And particularly for *Diſobedience to an Order of Seſſions* founded on 43 *Eliz. c.* 2. §. 7 & 11. ordering a Grandfather to maintain his Grandſons; In which Caſe, as this Remedy (by Indictment) *exiſted before* the Statute, there are now TWO Remedies; One, by *Indictment for diſobeying the Order*; The Other, to *diſtrain for the* 20*s. Penalty*, after the Expiration of the Month. *ibid.*

But it would be *oppreſſive*, to take the Remedy by *Indictment*, where the ſummary Remedy *can* be uſed; (which, in *ſome* Circumſtances, may be impracticable.) 804.

On

On 22 *C.* 2. *c.* 12. § 9. For not ſending a Cart and Men to the Highways. *Page* 832.

1ſt. "*Being* then Surveyors"—is a *ſufficient Averment* "That they *were* ſo." 834.

2dly. It is *not* neceſſary to alledge *when* or *by whom* the Surveyors were appointed. *ibid*

3dly. This was an Offence *indictable* BEFORE *this Act*; And therefore the *particular Remedy* given by it is CUMULATIVE. 834. *V. ſupra* 545 and 803 to 806.

Lies againſt a Conſtable, for a Miſdemeanour in *wilfully ſuffering a looſe idle lewd and diſorderly* Woman, taken up by One of the nightly Watch as a Common Street-Walker and *delivered to him* for ſafe Cuſtody, to *eſcape* out of his Cuſtody, before She could be carried before a Magiſtrate. 866, 867.

For a CONSPIRACY "to indict for a *Capital* Offence," was laid, "That the Defendants did wickedly and malici- "ouſly *(omitting* the Word *falſely)* conſpire to indict and "cauſe to be indicted *W. G.* for A Crime or Offence "*(omitting* to ſpecify WHAT Crime) liable by the Laws "of this Kingdom to be puniſhed capitally; And that "they, ACCORDING TO *the Conſpiracy aforeſaid* between "them as aforeſaid before had, DID afterwards FALSELY "*wickedly and maliciouſly indict* Him *&c*;" *ſpecifying* the *very Indictment itſelf*; which *appears to be for a Capital Crime:* This is a *good* Indictment; although the Word "FALSELY" is not added to the *firſt Charge* of the Conſpiring, nor the *particular Crime* there ſpecified. 999. And although it is *not* laid "that the ſaid *W. G.* was "*acquitted* of it." 998, 999. Note—The *Sentence* was *not the* VILLAINOUS *Judgment*; though the Indictment concluded "*contra Formam Statuti.*" *ibid.* and 1027. It was a *long Impriſonment*; *Pillory*, *twice*; a *Fine*; and *Security for good Behaviour.* 1027.

On 5 *Eliz. c.* 4. §. 31. for exerciſing the Occupation of a TANNER, not having ſerved an *Apprenticeſhip for ſeven* Years therein—is ſufficient WITHOUT *ſpecifying and averring the Want of other* Qualifications allowed by *ſubſequent* Statutes: For ſuch other Qualifications or Exceptions ought to be ſhewn *by the Defendant.* 1036, 1037.

For where an Indictment is brought *upon* a Statute which has *general Prohibitory Words* in it, it is ſufficient to charge the Offence *generally*, in the Words of it: And if a *ſubſequent* Statute, or even a Clauſe of *Exception* in the *ſame* Statute, excuſes or excepts Perſons particularly circumſtanced, out of the general Words, ſuch *Excuſe* or *Exception* muſt come by Way of *Plea* or *Evidence. ibid.*

But where the Words of a Statute are *deſcriptive of the Nature of the Offence*, or the *Purview* of the Statute, or are *neceſſary to give a ſummary Juriſdiction*, the Indictment muſt in ſuch Caſes *ſpecify* in its particular Words. 1037.

For

For knowingly ſelling and delivering 16 Gallons of Amber-Beer AS AND FOR 18 Gallons, and *receiving the Price for* 18 Gallons, with Intent to deceive and defraud—Judgment was arreſted: For this is not an Offence indictable, but a *civil* Injury to a *private Individual*, owing to that private Perſon's own Careleſſneſs; a mere Non-performance of Contract. *Page* 1127 to 1130. *V. infra* 1130. S. P. *accord*.

Such *private* unfair Dealings (*unattended* with the Circumſtances of falſe Tokens, or falſe Weights and Meaſures, or Conſpiracy) are *not indictable*; as Delivering a leſs Quantity for a greater, or Selling an unſound Horſe as and for a ſound One. 1128.

The true Diſtinction is this. In all *ſuch Impoſitions or Deceits* where *common Prudence* is ſufficient to guard a Perſon from ſuffering, the Offence is *not* indictable, but the injured Party is left to his *civil* Remedy: But where ſuch Methods are taken to cheat and deceive, as a Perſon *can not* by *ordinary* Care or Prudence be guarded againſt (as falſe Weights and Meaſures, or falſe Tokens,) there it *is an Offence indictable*. 1129, 1130.

In a criminal Charge, there is *no Latitude of Intendment* to include *more* than is charged: The Charge muſt be *explicit* enough to *ſupport itſelf*. 1127.

The Court may uſe a *Diſcretion* either to *quaſh* an Indictment *on Motion*, for Inſufficiency, or to put the Defendant to demur to it: But *after Verdict*, They are *obliged* to arreſt Judgment, if they ſee the Charge to be inſufficient. 1127, 1129.

For ſelling and delivering 3½ Buſhels of Oats AS AND FOR 4 Buſhels, knowingly and with Intent to deceive &c—*quaſhed on Motion*; the Point having been fully and ſolemnly ſettled in the laſt preceding Caſe. 1130. *V. ſupra, the laſt Caſe before this.*

For a Nuſance in keeping a *diſorderly Houſe*; and therein, for Lucre and Profit, unlawfully and wilfully cauſing and procuring evil-diſpoſed Perſons of ill Name and Fame and of diſhoneſt Converſation to frequent and come together in it; and unlawfully and wilfully permitting them to remain there, *fighting of Cocks, boxing, playing at Cudgels*, and *miſbehaving themſelves*—is a *good* Indictment. It was objected to, as being *too general* 1232, 1233.

Information

Againſt a *Juſtice of Peace*, upon a Charge of his refuſing to *grant a Licence* to ſell Ale, unleſs the Man would *firſt pay Him* a collateral and diſputed Debt; and then *convicting* Him for ſelling Ale unlicenced, *without* any previous *Summons*; was denied upon the Merits (as the facts came out.) 653, 654. But

1ſt The Juſtices have *no Authority* to annex ſuch Conditions. *ibid. V. ſupra* 556 to 565. *infra*, 1345.

2dly.

2dly. The Complainant ought to *alledge his own Innocence*; *to* intitle Him to make this Application againſt the Juſtice. *Page* 654.

A *frivolous Complaint* being made the Ground of an Application for an Information (againſt a Juſtice of Peace,) the ATTORNEY, as well as the original Complainer, was made liable to the COSTS, (the Rule being diſcharged with Coſts;) He not only having *joined in the Affidavit*, and thereby appearing as Co-Proſecutor; but having alſo declared "That if it ſhould coſt *Himſelf* 100*l.* He would "lay the Juſtice by the Heels." 654.

A *Criminal* Complaint againſt a Juſtice of Peace ſhall not be attended to and entered upon, till the Maker of it ſhall have *diſcontinued* his *Civil* Action *already brought* for the ſame Injury. 720 to 723. See *Election*.

Againſt a *Juſtice of Peace*, for a Miſdemeanour in his Office—

1ſt. If the Juſtice has acted *irregularly*, (yet without any bad, oppreſſive, or injurious *Intention*,) He ſhall *not receive Coſts*; although the Complaint againſt Him be ill-grounded, miſrepreſented, and even partly falſe: For though ſuch a Complainant deſerves to be *puniſhed in Coſts*, Yet the Juſtice ought not to *receive them*. 722.

2d. But the Rule againſt the Juſtice ſhall be diſcharged, without Coſts. *ibid.*

Againſt *ſeveral* Perſons for publicly SINGING in the High Street before a Tradeſman's Door TWO *libellous Songs*, One groſsly reflecting upon his *Daughter*, the Other upon his Son; with *Intent* to *moleſt and diſcredit* Him and his ſaid Children, and to *deſtroy his domeſtic Peace and Happineſs in his Family &c.* Two of the Defendants were convicted upon the fourth Count: And there was a *general* Judgment againſt them, upon this *whole* Count. On Motion in Arreſt of Judgment.

1ſt Objection. That an Information or Indictment will not lie, for publiſhing two *diſtinct* Libels upon two *diſtinct Perſons*; any more than for an Aſſault upon Two: Becauſe they are *diſtinct Offences*, and may require different Puniſhments; and can not therefore be *joined* in one Indictment or Information. 983, 984.

But reſolved, 1ſt. That the Whole of this Charge is *one ſingle* Offence: The Gift of it is Singing theſe ſcandalous Songs, *with the Intent* charged. 2dly. That the Caſe of *Rex* v. *Clendon*, "That an Indictment will "*not lie*, for an *Aſſault upon* Two," is NOT *Law*. 984.

2d Objection. *Several diſtinct Defendants* charged with *ſeveral and diſtinct Offences*, cannot be *joined together* in *one* Information or Indictment; becauſe the Offence of *One* is *not* the Offence of the Other. 984.

But

But reſolved, That this was an *entire joint* Offence, committed by Both; and not like the Caſe of *Perjury*, which is a *ſeparate* Offence in *Each*. *Page* 985.

3d Objection. That this is an *entire general* Judgment upon the *whole* 4th Count: Whereas the *latter* of the two Songs is *not at all libellous*. 958.

But reſolved—1ſt. That the latter Song *is* libellous and defamatory; 2dly. If it was not, yet upon an *Information* or *Indictment*, it would only go towards leſſening the Puniſhment; but would *not* be a ſufficient Reaſon for arreſting the Judgment. 985.

Againſt a *Juſtice of Peace* acting *honeſtly and candidly and without ill Intention*, ſhall not be granted, even where He has acted *illegally*: But the Party complaining ſhall be left to his ordinary Remedy, 1162. And if He be complained of without ſufficient Ground, He ſhall have his *Coſts*. *ibid*.

Information *in Nature of* Quo Warranto.

The *Proſecutor* ſhall pay *Coſts*, where He makes a groundleſs and frivolous Application, knowing it to be ſo. 780. See *Coſts*.

Will not lie againſt a *whole* Corporation (*as a* Body,) at the Relation of a *private* Perſon, in the *Name of the Clerk of the Crown*, though Leave be aſked of the Court; For *ſuch* an Information is not within 9 *Ann. c.* 20. §. 4. A *Corporation* uſurping upon the Crown muſt be complained of by the *Attorney General*, on Behalf of the Crown. 869.

Inſpection—

Of a *Perſon confined in a Mad-houſe*, was ordered to be had by proper Perſons, *previous* to granting a *Habeas Corpus*. 1115.

Inſurance. See *Policy*.

Intereſt—

Where the Sum recovered ſhall *carry* Intereſt; and *from* what *Time*; and *to* what *Time*. 1081 to 1089. See *Gaming*.

In Caſes where a *new* Action may be brought, and a Satisfaction obtained *thereupon*, for Duties or Demands *ariſen ſince the Commencement* of the depending Suit, that Duty or Demand *ſhall not be included* in the Judgment on the former Action; And there, the Damages ſhall be aſſeſſed *only* up to the Time of the Wrong complained of. But where the Intereſt is an Acceſſary to the Principal, and the Plaintiff *can not bring a new Action* for any Intereſt *grown due between* the Commencement of the Action and the

the Judgment in it, It ſhall be *included*. *Page* 1086, 1087. See *Gaming*.

In the *Eaſt Indies*, the allowed Intereſt is *Nine per Cent.* A Bond was given there, where both Parties then reſided, conditioned for Payment *with that Intereſt*. An Action was brought upon it here. And Verdict for the Plaintiff. The Defendant affected very great *Delay*, in various Methods; particularly, by bringing a *Writ of Error* in the Exchequer-Chamber, and alſo in the Manner of proceeding upon it. It is both Law and Juſtice, that the Plaintiff ſhould recover the Sum lent, together with INDIAN *Intereſt* up to the Time of *ſigning the Judgment*; but with *only the* LEGAL *Intereſt* of *this* Country, upon the *accumulated* Sum liquidated and aſcertained by the Judgment, *from* the Time of ſigning the Judgment TILL *actual Payment* of the Money; For that is the *Real Damage* which the Plaintiff has ſuſtained by the Delay of the Execution and the Detention of his Debt. 1096 to 1099.

1ſt. He may *either* bring an *Action of Debt on the Judgment*, and have Damages *pro Detentione Debiti*: 1096.

2dly. *Or* He is intitled to a Satisfaction for this Damage, under 13 *C.* 2. *Stat.* 2. *c.* 2. (§. 8, 9, 10.) which obliges the Plaintiff in Error to give *Security* as well for *Damages* as Coſts. *ibid.*

3dly. And there are *four* Courts, to which Writs of Error may be made returnable; *viz.* The Houſe of *Lords*; The Court before the *Lord Chancellor Treaſurer and Judges* under 31 *E.* 3.) The *Exchequer-Chamber*, before the *Judges of C. B. and Barons* (under 27 *Eliz. c.* 8.) And *this* Court of *King's Bench*. *ibid.*

1ſt. The *Lords* give Coſts according to their *Diſcretion*. 1097.

2d. In the 2d—It is done by the Lord Chancellor or Lord Keeper, perſonally; And the Practice is, to give *Intereſt* from the Day of *ſigning the Judgment* to the Day of *affirming* it there: computed according to the *Current* Rate of Intereſt, *not* according to the *ſtrictly legal* Rate. *ibid.*

3d. In the 3d (the Exchequer-Chamber) The Officer ſettles it, unleſs there be particular Directions given by the Court; And He, in taxing the Coſts, allows *double* the Money out of Pocket or thereabouts, but NO *Intereſt*. *ibid.*

4th. In *this* Court, the *Officer* taxes theſe Coſts of Affirmance, ſomewhat more *liberally* than other Coſts; but has *never any Regard to* INTEREST, nor allows it as of Courſe; But the *Court themſelves* have ſometimes *ordered Intereſt* to be computed on the *Sum liquidated* by the Judgment below. *ibid.*

Ireland.

Trial by a Jury of the next *Engliſh* County. *Page* 859. See *Trial, Berwick.*
Importation from *Ireland* into this Kingdom. 1175, 1176. See *Statutes, Conviction.*

Judges Orders.

In *Vacation*, a Judge at Chambers may make an Order, "That the Defendant ſhall plead ſuch a Plea as he will "*ſtand by.*" 782.

"*Pleading* ISSUABLY" means Pleading *ſuch* an Iſſue as the Plaintiff might go to Trial upon. 782.

Judgment

Final—Interlocutory—
On the *Crown*-Side—
1ſt. The Judgment *ſigned in the Office* is *only interlocutory:* And the Award "quod capiatur" is only to bring the Defendant in; but is *not* itſelf the *final* Judgment. 801.
2d. Therefore a Motion *in Arreſt of Judgment* may be made (on the *Crown* Side) at *any* Time *before Sentence pronounced. ibid.*
Villainous—What it is; and *when to be awarded.* 996.
For the Plaintiff, on *One* Count or on one Plea; and *againſt* Him, on *another:* In what Manner *Coſts* are to be taxed. 753 to 756. and 1232. See *Pleading.*

Juriſdiction.

Conſent can not *give* it to a Court which has it not. 746.
Of the *Court of King's Bench* is not taken away, unleſs by expreſs Words. 1042. See *Certiorari.*
Ancient Demeſne—See *Ancient Demeſne.*

Juſtices of Peace.

Charge of *refuſing to* RECEIVE an Information againſt a *Baker*, for baking Puddings Pies and other ſuch Things, for Dinner, on a SUNDAY, contrary to 29 *C.* 2. *c.* 27: Whereas He did, in Fact, receive and *hear* it. The Rule to ſhew Cauſe why an Information ſhould not go againſt the Juſtice for a Miſdemeanour, was diſcharged with *Coſts.* 787, 788. See *Baker.*
Acting *honeſtly and candidly*, and *without* any bad View or ill Intention ſhall *not* be puniſhed in the extraordinary Courſe of an Information, even though He has acted *illegally:* But the Party complaining ſhall be left to his *ordinary* Remedy.

medy. 1162. And where They are complained of without Reaſon, they ſhall have *Coſts*. *Page* 1162.

Latin

IS neceſſary to be underſtood by a Perſon put APPRENTICE *to a* SURGEON *of London*. 892 to 897. See *By-Law*.

Latitat—

Where the *true* Time of ſuing it out is *material*, It may be *ſhewn*, notwithſtanding the *Teſte*. 963 to 967. See *Pleading*, 950 to 969.

It was not ſettled, till many Years after the Statute of 21 *J.* 1. *c.* 16. "That the Plaintiff *might* reply a *Latitat*." 961.

And now, though the *Latitat* is holden to ſave the Bar, within the *Equity* and *Reaſon* of the Statute, yet it muſt be taken out *with Intent to declare in that Action*, and muſt be *continued* to the Filing of the Bill. *ibid.*

The *Teſte* of a *Latitat* ſued out in Vacation *muſt* be of the preceding Term. 964.

A *Latitat* is a *good Commencement* of a *Penal* Action. 964.

A *Latitat* may bear *Date before* the Cauſe of Action, if *really* proſecuted *after* it. 967.

Leaſes.

A Leaſe "for 7, 14, or 21 Years, *as the Leſſee ſhall think pro-* "*per*;" (upon which the Leſſee enters, and continues in Poſſeſſion;) is undoubtedly a *good* Leaſe for *ſeven* Years; whatever may be its Validity as to the two other eventual Terms of 14 and 21 Years. 1034.

A Leaſe may *commence* at one Day, in Point of *Computation*; and at another Day, in Point of *Intereſt*: And ſuch a Leaſe, "*Habendum from* a Day paſt, for 50 Years then "next enſuing; the ſaid Term to *commence and begin* "from and immediately *after the Determination* of an ex-"iſting Leaſe of the ſame Premiſſes," ſhall *not* be eſteemed uncertain in its Commencement. 1190 to 1198.

Libel, Libellous.

Words ſpoken or ſworn in a Man's *own Defence* againſt a Complaint in a *Court* of Juſtice, are *not actionable*; becauſe 'tis in a *legal* and *judicial* Way: the Words were—"which "Sir *J. A.* hath *ſo falſely ſworn* againſt Him." 809 to 813. See *Affidavit*.

Licence—

Licence—

To *ſell Ale*. *Page* 653, 654. *V. ſupra* 556 to 565. and *Information*, (under *pa.* 653, 654. and under *pa.* 1345.)

Limitation.

In *Pleading the Statute* of 21 *J.* 1. *c.* 16. If the Plaintiff replies "That He ſued out a LATITAT *teſted within* "*Time*," the Defendant may (in his Rejoinder) *ſhew the* TRUE *Time of ſuing* it out, notwithſtanding the Teſte. 967. See *Pleading*, 950 to 969.

The Limitation of Suits is founded on *public Convenience*, and adopted by Courts of Equity. 961.

The Replying a *Latitat* is *now* holden to *ſave the Bar*, within the *Reaſon* and *Equity* of the Statute: But it muſt be taken out WITH INTENT *to declare in that Action*; and muſt be *continued* to Filing the Bill. 961.

Of *Actions*. *Acknowledgment* of the Debt, *after* Commencement of the Action, takes it *out* of the Statute of Limitations. 1099.

London.

On the *Return* of a *Habeas Corpus (cum Cauſa)* the *Validity of a By-Law* ſhall not be determined in a *ſummary* Way, in the Caſe of *any* Corporation *except London*. 776 to 780. See *Habeas Corpus cum Cauſa*.

No Writ of Error lies to *B. R.* from *their* Courts; though it does from *all other* Corporation Courts. *ibid.*

Mandamus.

TO reſtore a *Corporator*. 731 to 736. See *Corporation*, *Amotion*, *Diſfranchiſement*.

Croſs or *Concurrent Mandamuſes*, "togo to Elections in Cor- "porations," are *not* to be granted of *Courſe*, without ſome *ſpecial and particular Reaſons*. 783 to 785.

But 'tis *otherwiſe*, if there be a Ground of Suſpicion laid "that the Party firſt applying for the Writ *does not really* "*mean to execute it*." *ibid.*

The *Court* will not ſpecify to *Whom*, *by Name*, ſuch Writs ſhall be directed: The Perſon who *applies* for it, is to take Care, at *his* Peril, that it be directed to the proper Perſon. 784, 785.

Directed to the *Mayor* AND *Jurats* (of *Rye*) "to admit and "ſwear a Jurat." The MAYOR *claims a ſole and excluſive*

Right to the Nomination of Him; and the JURATES *deny any ſuch Right in the Mayor:* So that they can *never* JOIN in any Return. It was therefore conſented to try the Right in a *feigned* Iſſue. *Page* 798, 799.

To admit a *Quaker*, having taken his AFFIRMATION, but refuſing to take the OATH preſcribed by 26 *G.* 2. *c.* 18. into the Freedom of the *Turkey Company*—was granted peremptorily. 1004, 1005. See *Quaker.*

Brought by a *Corporate-Officer*, who is charged with having *omitted to take the Sacrament within a Year before his Election*, and "Non fuit electus" returned to it:—*When* it *is*, and *when* it is *not* incumbent upon Him to PROVE his having done it. 1013 to 1017. See *Sacrament.*

Lies, to *reſtore* a CURATE OF A CHAPEL, being a Donative *endowed with Lands*; the Curate having been *appointed*, and *claiming a Right* (though conteſted,) and having a *Licence*, and having been 11 *Weeks in quiet Poſſeſſion*, and then turned out by Force: For this is a *temporal* Right; and where there is a *temporal* Right, the Court will aſſiſt by Way of *Mandamus.* 1044 to 1047.

1ſt. A *Mandamus* "*to reſtore*" is the true *ſpecific* Remedy for a wrongful Diſpoſſeſſion of any *Office or Function which draws Temporal Rights* after it; in all Caſes where the eſtabliſhed Courſe of Law has not provided a *ſpecific* Remedy by another Form of Proceeding. 1045.

2d. If the Biſhop had refuſed (without Cauſe) to *licence* this Chaplain, He might have had a *Mandamus. ibid.*

3d. Neither *Ejectment* nor *Treſpaſs* (if He had the legal Property in Him, and could bring thoſe Actions,) would be a SPECIFIC *Remedy* to reſtore him to his Pulpit and quiet Him in the Exerciſe of his Function. *ibid.*

To a *Treaſurer of a County*, requiring Him to *reimburſe Conſtables*, on the Act of 17 *G.* 2. *c.* 5. §. 16, 17. relating to Rogues Vagabonds and idle and diſorderly Perſons. 1197, 1198. See *Statutes.*

Manor—

Neither the *Quit-Rent*, nor the *Heriots*, or other *Caſual* Profits of a Manor are RATEABLE *to the* POOR-*Tax.* 991 to 993.

Holden in *Ancient Demeſne.* See *Ancient Demeſne.*

Marriage—

Contrary to 26 *G.* 2. *c.* 33. §. 11. is ABSOLUTELY *void.* 898, 899. See *Orders of Removal.*

In a *foreign* Country, muſt, *in general*, be governed by the Laws of that Country, where had: But Marriages in *Scotland*,

Scotland, of Perſons going from *England for that Purpoſe*, may come under a very different Conſideration. *Page* 1079, 1080.

Meſne Profits.

In *whoſe Name* the Action for them is to be brought. 668. See *Ejectment*.

What muſt be *proved* by the Plaintiff in ſuch Action. 667, 668. See *Ejectment*.

What may or may not be *controverted* by the Defendant. *ibid.* See *ut ſupra*.

Militia.

A *Subſtitute* muſt, *ſince* the Act of 33 *G.* 2. *c.* 22. be conſidered *as* a Militia-Man within the 31 *G.* 2. *c.* 26. §. 28. 1151.

Though a Town has a *ſeparate* Stock of their own, and does *not contribute* to the County-Stock, yet they ought to be *reimburſed* out of the COUNTY-*Stock*, for Allowances made (under a proper Order) to the Families of ſuch of their Men as have been Subſtitutes for Inhabitants of *other* Parts of the County. *ibid.*

Money—

Payment of it *into Court*. 578. See *Practice*.

Mortgage

Of *Ships* abroad, or *Cargoes* upon the *High Seas*, by a Trader is good, *without* actual Delivery of Poſſeſſion. 941. See *Bankrupt*.

Of *Copyhold* Land in Fee, forfeited, and deviſed by the Mortgagee. 969 to 980.

A Mortgage is a *Charge* upon the *Land*: And whatever Words in a Will would give the *Money*, will *carry the Land along with it*. 978.

1ſt. It will be *liable to Debts*. *ibid.*

2d. It will *go to Executors*. *ibid.*

3d. It will paſs by a *Will not* made according to the *Statute of Frauds*. *ibid.* and 979.

4th. The *Aſſignment* of the Debt, or *Forgiving* it, will *draw the Land* after it. 979.

5th. So if the Debt was *forgiven only by Parol*. *ibid.*

Naviga-

Navigation

MAY not be *obſtructed* by caſting *Rubbiſh*, or unlading *Ballaſt*, in any Havens, Roads, Channels &c; but ONLY *upon the* LAND, where the Tide never flows: By 34, 35 *H.* 8. *c.* 9. and 19 *G.* 2. *c.* 22. *Page* 656 to 661.

1ſt. The Unloading it *into a Hopper*, with *Intent* to carry it *out to Sea*, is an Offence againſt the *expreſs* Proviſion of the latter Act, which ſays "That it ſhall *not* be diſcharged, *but* ONLY *upon Land*." 659, 660.

2dly. But putting it into the Hopper, *in Order to carry it upon Land*, would *not* be ſo. *ibid.*

3dly. Nor *Shifting* it out of one Ship into Another, without Intention *to drop it* ANY *where*. 660.

New Foreſt.

The Statute of 9, 10 *W.* 3. *c.* 36. for the Increaſe and Preſervation of the Timber therein, (*V.* §. 1. and 9.) gives the Crown Power to incloſe 2000 Acres, (*viz.* 1000 immediately, and 1000 at a *ſpecified Time*;) and afterwards to incloſe more; freed and diſcharged of all Manner of Rights &c.

1ſt. By the 9th Section, the Right of COMMON is,

1. In the *incloſed* Parts, reſtrained *abſolutely*, ſo long as they *remain incloſed*. 1119, 1120.
2. In the UN*incloſed* Parts, It is *continued*, under certain *Limitations* and Exceptions. *ibid.*

2dly. But the Right of PANNAGE is (by that Section) *abſolutely taken away*, for 18 Years; and is, even after that, *reſtrained* to a limited Time (*viz.* between 14th *September* and 11th *November*.) *ibid.*

3dly. Theſe Reſtrictions take Place, though 1000 *Acres* ONLY be yet incloſed: It is not a Condition precedent, "that the *Whole* ſhall be firſt incloſed." *ibid.*

New Trial

Shall *not* be granted, even where the Jury have found for the Defendant *againſt Evidence*; if the Plaintiff appears to have received NO REAL *Injury*, and the Damages (if the Verdict had been found for the Plaintiff) could have been but a MERE *Triſle*. 665. *V. next Caſe below.*

Though the Ground of a Verdict for a Plaintiff be wrong, yet if *no Injuſtice* be done to the Defendant; or if the Plaintiff can, by *another Form of Action*, recover as much; *No* new Trial ſhall be granted: *Contra*, where *Injuſtice is done*

done Him by it; and if it be not *clear* that the Plaintiff may recover as much by *another Form of Action. Page* 936.
WITHOUT *Coſts.* 1228. See *Bill of Exchange.*

Notice—

To *ſelect* Bodies of Corporations; which ſelect Bodies have Power to amove. 731 to 736. See *Diſfranchiſement, Amotion.*

Orders

UPON *Surveyors of Highways* "to paſs their *Ac-*
"*counts* and *pay over* Money," cannot be made, *originally*, by the *General* Quarter-Seſſions. 745, 746.
1ſt. This Juriſdiction is given to a *Special* Seſſions by 3, 4 *W. & M. c.* 12. §. 9. *ibid.*
2dly. The *General* Quarter Seſſions have no ſuch Juriſdiction, but on Appeal. *ibid.*
3dly. *Conſent* can *not give* Juriſdiction to a Court that has *none. ibid.*
On Appeal from *Poor-Rates—Quit Rents, Heriots* or other *Caſual Profits of a Manor*, are *not aſſeſſable.* 992.
On Dº.—Five *private* Perſons take a Leaſe of 29 old Houſes, to be converted into an HOSPITAL FOR LUNATICS ſupported by free and voluntary Contributions of *private* Charity: Which Hoſpital was laid out in Wards and Cells for the Lunatics and *Lodging-Rooms for the menial hired Servants* neceſſarily attending them; And *None but* the poor helpleſs *Lunatics* and the Perſons *neceſſarily attending them* have any kind of Dwelling in or Occupation of the ſaid Hoſpital. One *Joſeph Manſfield* (the Appellant) was the principal Perſon *hired* from Year to Year, and *receiving Wages*, and being in the ſaid Hoſpital for the Purpoſes of *attending on* the ſaid Lunatics, and having NO OTHER *Abode Occupation or Eſtabliſhment therein:* And the 5 *Leſſees* have not, nor ever had, nor can have any *Profit Benefit* or *Advantage* from the Premiſſes, nor any Poſſeſſion or Occupation thereof, otherwiſe than as aforeſaid. MANSFIELD was rated *as* OCCUPIER. He appealed. The Seſſions diſmiſs the Appeal, and *confirm* the Rate; declaring their Opinion "That the ſaid Tenement called *St. Luke's* "*Hoſpital* OUGHT *to be aſſeſſed and* rated towards the "Relief of the Poor, by the ſaid Rate." But their Order was *quaſhed* by this Court. 1063 to 1066. For,
Per Cur.'
1ſt. IF *no Perſon* can be fixed upon, who may properly be rated *as* OCCUPIER, there can be *no Rate* made upon it *at all.* 1063.
2dly.

2dly. NEITHER the *Leſſees*, (who are merely nominal unintereſted Truſtees,) nor the *Servants*, much leſs the *Lunatics* themſelves, are rateable *as* OCCUPIERS. *Page* 1064, 1065.

3dly. THIS is *not* like the Caſe of Hoſpitals of Royal Foundation where the Officers have APARTMENTS which they uſe *as Dwelling-Houſes* (as in *Chelſea* and *Greenwich* Hoſpitals) where They *and their Families* reſide: For it has been determined "that All thoſe *large* "*diſtinct Apartments* ought to be taxed to the *Window*-"*Lights* as *Dwelling-Houſes*; and that the ſaid Officers "*are* rateable, for them, to that Tax." 1063, 1064.

Orders of Removal—

N°. 149. A Pauper cannot be removed from *his* OWN; though He came originally into the Pariſh by Certificate. 702. *V. ſupra*, under *pa.* 507. N°. 143.

N°. 150. *Apprentice to a Certificate-Man* does *not* gain a Settlement, where the Maſter (being *uncertificated* at the Time of *Binding*) obtains and delivers a Certificate, *before* the Apprentice has ſerved Him 40 *Days*: For, by 12 *Ann. Stat.* 1. *c.* 18. §. 2. it is a *Condition* PRECEDENT to the Apprentice's gaining a Settlement, "That He muſt have "been bound to and ſerved *for* 40 *Days*, a Maſter who "did not either *come* into, OR RESIDE IN the Pariſh by "Licence of a Certificate." 752, 753.

N°. 151. *Thomas Lymer*, legally ſettled in *Sbenſton*, took a Houſe in *Gratwich* at 30 *s. per Annum*; and afterwards took 2 Acres of Land in *King's Bromley*, for the growing of POTATOES from CANDLEMAS to MICHAELMAS, for 9 *l.* and alſo ½ an Acre there, at 40*s.* for the *like Term*; and paid his Rent for all the Premiſſes, which were of the VALUE aforeſaid. He entered, and enjoyed the Lands during the Term; and *lodged above* 40 *Days in K. B.* (where the Land lay) for the Convenience of digging up and diſpoſing of the Potatoes. 760.

1ſt. It was agreed, That *if* the Taking be ſufficient, this *Reſidence* would gain Him a Settlement in the Pariſh *wherein He reſided*. 761, 763, 764.

2dly. This Taking, of above 10 *l. per Annum Value*, in the *Manner Stated*, is ſufficient. 763, 764.

3dly. For the *Criterion* of the Act of 13, 14 *C.* 2. *c.* 12. is the *Credit* and *Ability* of being truſted with and uſing a Tenement or Tenements, in the ſame Pariſh or in different Pariſhes, of the yearly VALUE of 10 *l. Such* a Perſon not being conſidered by the Legiſlature, as a Vagrant. *ibid.*

4thly. And a Taking "for a *whole* Year" is *not neceſſary*: The *Value* is the Thing to be regarded; *not the Duration* of the Tenure. 763, 764, 765.

5thly.

5thly. Eſpecially, in a *Species of Culture* where the *whole Year's Profit* ariſes in one particular Part or Seaſon of it. *Page* 763, 764.

A Servant hired for a Year, going away for the laſt 5 Weeks, and ſerving another Perſon, *is* or *is not*, a DISSOLUTION of the Contract; according as it is *with* or *without*, the LEAVE of his Maſter or Miſtreſs. 790. *V. ante* 592 to 595. N°. 152.

Here the Miſtreſs gave a general Leave to work with this Perſon; And when they came to ſettle Accounts, the Servant returned to his Miſtreſs the *exact particular Sum* received of this Perſon, for his 5 Weeks Work: Which made it clear to the Court, That this was an Abſence WITH Leave. 790.

Mary Dormer married *Abraham Coiffeau*, born in *St. M. B. G.* *Son of Iſaac Coiffeau a Frenchman* that had *never gained any Settlement* in *England*, and of *Elizabeth Taylor* who was BORN *in St. Katharine's*. *Abraham Coiffeau* died. The Settlement of *Mary his Widow* and her *Infant Children* by Him, is in *St. Katharine's*, where *Elizabeth Taylor Mother* to *Abraham Coiffeau* was ſettled. 870 to 875. N°. 153.

1ſt. *Elizabeth Taylor*, *Abraham Coiffeau*'s Mother, muſt here be conſidered as *ſettled* where ſhe is ſtated to have been born. 872, 873.

2dly. *Abraham's* Settlement muſt follow the Settlement of his *Mother*; becauſe his Father had *none* 872, 873.

3dly. And the Settlement of *Abraham's Wife and Children* muſt follow *His*. *ibid.*

4thly. Therefore *Mary's* Place of Settlement is out of the Caſe; being that of her *Huſband*. *ibid.* And that of her Huſband is here *known*. *ibid.*

5thly. *Birth* would give *even a legitimate* Child a Settlement, in Caſe its Parents had *none*. 873.

6thly. There is NO *Difference or Diſtinction* between an *acquired* and a *derivative* Settlement. 872, 873.

The *Marriage* of a Pauper being *contrary to* 26 *G.* 2. *c.* 33. §. 11. (the Man being under Age and not &c.) was holden to be ABSOLUTELY *void:* And therefore the *Woman* and *Child* could *not* be removed to *his* Settlement. 898, 899. N°. 154.

The being *aſſeſſed* to the Land-tax, *and paying it*, though *allowed it again* by the Landlord, *gains* a Settlement: Determined as a ſettled Point. 902, 903. *V. ſupra*, under *Pages* 247, 248, and 370, 371. and 623. N°. 155.

The Pauper *let Himſelf* to his Brother, a *Carpenter*, a legal Inhabitant of *Hitcham*, for one Year; and continued in his Service a Year. By their mutual Agreement, the Pauper was to receive *no Wages in Money*; but his Brother was to *teach him the Trade* of a Carpenter, and to provide him with *Meat Drink Waſhing* and *Lodging*. He was to do all his Brother's Buſineſs in the *Farming* Way, and *any* N°. 156. and N°. 161.

any other Work. Particularly, his Brother having taken a Neighbour's Corn to cut, He ordered the Pauper to cut it: He did ſo; and his Brother *took the Money*. The Pauper hereby *gained* a Settlement in *Hitcham*. *Page* 910, 911.

The laſt mentioned Order was ſent down to be *amended*, upon Allegation and Affidavit of a *Miſtake in the* FACT of it: *viz.* being mentioned as a *married* Man, when in Fact He was *ſingle*. 911.

And the Seſſions heard *new* Evidence, which proved that He was *ſingle* at the Time of the hiring. 911.

But as the *Affirmance* of the Order of Seſſions aroſe from its being amended upon *new* Evidence, The Court *diſcharged the Recognizance*. 911 and 1035.

N°. 157. A Child of 8 Years of Age, taken into a Family *out of* CHARITY, and boarded lodged and clothed; but *without any* HIRING or any CONTRACT as to Continuance, Service, Wages or Gratuity; gains NO *Settlement* by this Service, though He continued ſix Years in it: And upon this State of the Caſe, no Hiring can be *preſumed*, though it was near 50 Years ago. Indeed, where a *General* Hired is *ſtated*, the Court will preſume it to have been a *regular* One, unleſs the contrary appears. 930. *V. infra* 990.

N°. 158. A Servant was *frighted into Fits*, 17 Days before the End of her Year's Service, and thereby rendered *incapable* of performing any. Her Maſter ſent Her firſt to a private Houſe: And She was afterwards taken into an *Hoſpital*; and her Indiſpoſition laſted beyond the Expiration of her Year; So that She *never returned* to her Service. But her Miſtreſs, in the Interim, paid Her the *whole* Year's Wages. No Words of Diſcharge paſſed. 945 to 950.

The Court clearly held as follows; *viz.*

1ſt. She *gained* a Settlement by this Service. *ibid.*

2d. *Sickneſs* (the Act of God) does *not diſcontinue* the Service, or prevent a Seltlement. 948, 949.

3d. The *Time* of *Sickneſs* makes *no Difference*; be it in the *Beginning*, *Middle*, or *End* of the Year. 948, 949. It is not like the Caſe of *Abſence without Leave*; which, if it be in the *Middle* of the Servant's Year, may be *purged* by receiving Him again; though not ſo, if it be at the *End* of the Year, when he *never returns*. *ibid.* But *Abſence with* Leave, for a ſhort Time, or even to go upon any other Service, and Payment of the *whole* Wages, does not hinder from being a fair *bonâ fide* Service. *ibid.*

4th. If a Servant is *taken ill by the Viſitation of God*, the Maſter is *bound to provide for* and *take Care* of ſuch Servant, and *cannot deduct Wages*; *per* Ld. *Mansfield*. 948.

5th. The being ſent to an *Hoſpital* makes no Difference from being under her Maſter's Roof. 948, 949.

6th.

6th. "*Continuing and Abiding* in the Service," *(per Deniſon* J.) means *not deſerting* it. *Page* 949.

7th. *Gaining a Settlement* is a *Benefit* and *Reward* to a Servant; *(per Foſter and Wilmot.)* 949.

A Farm of 8 *l. per Annum* in *Kniveton* was hired for a Year, by the Pauper alone: And He and Another *jointly* hired another Farm there, of 3 *l.* 15 *s. per Annum*, and agreed "that the Other ſhould have One Half of the Corn and "Hay; and after that, the Pauper ſhould occupy the "*whole* Farm, to the End of the Year, paying to the other "4 *s.* for his Share of it." *Per Cur'*—All this taken together is UNDER *the Value of* 10 *l. per Annum.* For the VALUE muſt be eſtimated *according to the* RENT: And this Rent (of 8 *l.* and 1 *l.* 17 *s.* 6 *d.*) does *not* amount to 10 *l.* and the Agreement between the two Joint Tenants, about the 4 *s.* can *not* be conſidered as a *Rent.* 988. N°. 159.

A *Hiring at all*, is, by Law, a Hiring *for a Year.* 990. And the following Dialogue is clearly a *ſufficient Hiring*; *viz.* "Do you like the Life of a Keeper?" Anſwer (by the Servant, the Pauper,) in the Affirmative. Maſter—"*Then Go into Ned Hill's Place*; and you ſhall want no "Encouragement; I'll give you a Suit of Cloaths direct-"ly." To which, the Pauper readily conſented, and went into the Place. Note—The Maſter was a Head-Keeper: And *Ned Hill* had been many Years One of his Servants or Under-Keepers, at the Wages of 3 *l.* a Year and a Keeper's Livery, beſides Meat Drink and Lodging. 990. N°. 160.

Original (Writ).

An Original Writ is *abateable*, if it bears Date *before* the Cauſe of Action. 967.

Overſeer.

A *Rate* can not be made to *reimburſe* an Overſeer: But He may *reimburſe Himſelf, whilſt in Office*, out of the next Money raiſed. 1153, 1157.

Poor-Rates ſhould (as it ſeems) either be made *Monthly*, or at leaſt divided and diſtributed into ſo much *per Month*, 1157.

Dying with Pariſh-Money in his Hands, his Executors or Adminiſtrators muſt pay it *before any other Debts*, (by 17 *G.* 2. *c.* 38. §. 3.) 1154, 1156, 1157.

Pariſh-

Pariſh-Office—

CONSTABLE of a MANOR including the Pariſh, but *more extenſive*, is not a PARISH-Officer within 10, 11 *W.* 3. *c.* 23. §. 2, 3. 1182 to 1187. See *Certificate.*

Pauper—

Upon an *Attachment for a Contempt*, The Defendant can not be admitted to defend *in Forma Pauperis.* 1039.

Perjury—

In an *Anſwer in Chancery*—No Need to prove *Identity of Perſon*, nor *actual* Swearing. 1189. See *Proof.*

Pillory.

Dr. Shebbeare, convicted of writing and publiſhing a Treaſonable Libel, was ordered (as One part of his Sentence) to be ſet IN and upon the Pillory, at *Charing-Croſs.* The Under-Sheriff of *Middleſex* (Mr. *Arthur Beardmore*) ſuffered Him to ſtand UPON it *only*, in a Sort of Triumph, *without* putting his Head, Neck, Arms, or Hands THROUGH the reſpective Holes; a *Servant* in Livery holding an *Umbrella over his Head.* And although the Under-Sheriff ſhewed that *his* officiating that Day was *quite accidental*; and though He produced many Affidavits to ſhew that it was *not uſual*, in *Middleſex*, to put the Head, Neck or Arms or Hands *through*; and though He ſwore poſitively to the *Innocence and Uprightneſs* of his INTENTION, and that He did, according to the *beſt of his Judgment, fully and duly execute* the Sentence of the Court in the USUAL *and* COMMON *Manner*; Yet an *Attachment* iſſued againſt him for this Contempt; And He afterwards was *fined* 50 *l.* and *committed* to the Cuſtody of the Marſhal, for 2 Months; 794 to 798.

Play—

Money *loſt or lent* at Play; And *Securities* given for the ſame. 1077 to 1088. See *Gaming.*

Pleading.

Defendant pleads TWO PLEAS (by Leave, under 4, 5 *Ann. c.* 16.) 1. *Not guilty*; 2dly. *Not guilty within 6 Years:* On the former of which, *Iſſue* is joined, tried, and

and *found for the Plaintiff*, with Damages; On the latter, there is a *Demurrer*, Joinder in Demurrer, Argument (ſubſequent to the Trial,) and Judgment *for the Defendant*. *Page* 753.

1ſt. The *general* Queſtion might require much Conſideration: 754.

2dly. But the *particular Circumſtances* of this Caſe ſuffice for its Determination, *without* going into the general Queſtion. *ibid.*

1. The Plaintiff, *upon the* WHOLE, has no Cauſe of Action. *ibid.*
2. Therefore He can have *neither Judgment* for Him, *nor Coſts*. 755.
3. The *Judgment* muſt be *for the Defendant*. *ibid.*
4. And the *Defendant* muſt have *Coſts of the Demurrer*, *ibid.*
5. But upon the *Trial*, *no Coſts* on *either* Side. *ibid.*
6. The *former* Plea is *not neceſſarily implied* in the *Latter*: for the Plaintiff *might*, in the Courſe of Pleading, have carried the latter off from the Merits, to a Collateral Point. *ibid.*

Withdrawing a Replication and *Replying de novo* was permitted (for a reaſonable Cauſe) after 6 Terms; and conſidered as an *Amendment*. 755, 756.

In Debt upon Bond, for the *Penalty*, where there are *alternative* Parts of the Condition, the Plaintiff muſt confine Himſelf to a *particular Breach*. 774, 775.

There is *no Need* to ſpin out Pleadings to *Prolixity*, where the Thing is *known*: As, to ſpecify the reſpective Proportions of the Pay of a Regiment, in aſſigning a Breach in an Agent's Non-Payment of it. *ibid*

Concluding with an Averment, inſtead of Concluding to the Country, is only *Form*, and ought to be *ſhewn for Cauſe* of Demurrer, *ibid.*

Where an *Affirmative* and *Negative* are *not applied to the ſame Thing*, the Concluſion needs not be to the Country. *ibid.* *V. infra* 1022

Bond conditioned "to pay Money on *or before* ſuch a Day:" Plea of "Payment at a Day *before* that Day." The Plaintiff demurred to the Plea, as offering an immaterial Iſſue. The Diſtinction is, "That wherever the Defendant, in an Action of Debt upon Bond with a *Special* "Condition, pleads *Performance*, the Plaintiff muſt aſſign "an *abſolute* Breach; though this be not neceſſary, where "the Defendant pleads a *Collateral* Matter, (as a Releaſe.") The preſent Plea, therefore, is a *proper* One: And the Plaintiff ought to reply, "That the Money "was not paid upon the Day alledged, *nor* at any Time "*before or after* that Day." 944, 945.

The Statute of *Limitations* (21 *J.* 1. *c.* 16.) being pleaded to an Action upon the Caſe upon *Aſſumpſit*, and "that "the

" the Promiſe was not made within ſix Years next be-
" fore the *exhibiting of the Bill*," The Plaintiff replies
" that *on the 28th of November* 32 *G.* 2. (within 6 Years
" *&c.*) He *ſued out a* LATITAT, with *Intent* to exhibit
" his Bill thereupon, and accordingly did exhibit his
" Bill thereupon, in *Hilary* Term 32 *G.* 2; And that the
" Promiſe was made *within ſix Years next before the* SUING
" OUT *of this* LATITAT." The Defendant rejoins,
" That by the *Courſe and Cuſtom of this Court* of *B. R.*
" a *Latitat* ſued out *after the End of any Term* is *ſuppoſed*
" to have iſſued within the Term preceding: But that
" *this Latitat* was REALLY *and* TRULY *ſued out* AFTER
" *the ſaid 28th of November, viz.* on the 8TH OF DE-
" CEMBER in that Year, and on the *ſame* Day and Year
" was *ſigned* according to the Statute; and that the
" Promiſe was *not* made within ſix Years next before the
" ſaid 8TH OF DECEMBER, on which Day the *Latitat*
" was ſo REALLY *and in* TRUTH *ſued out*." The Plain-
tiff demurred to this Rejoinder. But the Court were All
clear " That the *Averment* therein contained, *ought*, by
" Law, to be ADMITTED:" And in Conſequence of that
Opinion, They *over ruled the Demurrer*, and gave *Judg-
ment for the* DEFENDANT. *Page* 950 to 969. See *Aver-
ment, Latitat, Limitation, Teſte.*

Where there is an *Affirmative and a Negative*, the CON-
CLUSION muſt be to the *Country*. 1022. *V. ſupra* 774.

In Debt on Bond conditioned " for *G's* rendering an Ac-
" count within 30 Days after *any* Demand in Writing,"
The Defendant (*proteſtando* " that no Demand in Writing
" was made") pleads " that *G. did render an Account*
" within 30 Days after *any* Demand in Writing:" The
Plaintiff replies " that a Demand in Writing was made
" *on a particular Day* (ſpecifying the Day;) And yet
" no Account was rendered by *G.* within 30 Days after
" it;" and *concludes* to the COUNTRY. *ibid.* and 1023.

1ſt. This *Plea* " that *G.* rendered *&c* within *&c* after
" *any* Demand" muſt be underſtood as if it had been
worded, " after *every* Demand." 1023, 1024.

2d. The *Replication* is *rightly* concluded to the *Country*.
ibid.

In Covenant—Breach aſſigned in Non-Payment of Rent *to
a Wife and her* SECOND *Huſband*, upon a Leaſe made by
her FIRST *Huſband and Her*, for 7, 14 OR 21 Years, *as
the Leſſee ſhould think proper*. The Leſſee had covenanted
to pay the Rent to them and their Executors Adminiſtra-
tors and Aſſigns, during the SAID TERM: And *He* had
entered, and was poſſeſſed, and *continued in Poſſeſſion*.
The *ſecond* Huſband and the *Wife* (the former Huſband
being dead) aſſign the Breach in Non-Payment TO THEM-
SELVES of Rent incurred within the *firſt ſeven Years*.
General Demurrer to this Declaration, Joinder in De-
murrer. Judgment for the Plaintiffs.

On

On a *Recovery in C. B.* being put in Iſſue on "*Nul tiel* "*Record*," The proper and neceſſary Method and Courſe of Practice is, To iſſue a CERTIORARI, and have it *certified:* And the Court refuſed to ORDER the *Officer of C. B. to* ATTEND *in B. R. with the Record. Page* 1034.

A Declaration conſiſted of *two Counts:* The Defendant pleaded to One; and demurred to the Other. He had Judgment *for* Him on the Demurrer: But a Verdict was given *againſt* Him, on the Plea. The *Plaintiff* is intitled to *Coſts* upon his Verdict: The Defendant, to none upon his Demurrer. 1232. *V. ſupra*, 753 to 755.

Policy of Inſurance

On a *Ship*, and on the *Cargo*, (by two diſtinct Policies,) from *Newfoundland* to *Portugal* or *Spain &c.* The Ship was to be valued at the Sum ſubſcribed: The Cargo was *Fiſh* and other Merchandiſe. The Ship was TAKEN *by the Enemy*; the Maſter Mates, and All the Sailors (except an Apprentice and a Land-Man) *taken out* and carried to *France*; the Ship remained in the *Hands of the Enemy* EIGHT DAYS; and was then RETAKEN by a *Britiſh* Privateer, and brought into *Milford Haven*; *Immediate Notice* was given by the Inſured to the Inſurers, with an *Offer to* ABANDON the Ship and Cargo; The Ship had been *ſo far diſabled by a Storm*, as to render Her incapable of proceeding on her deſtined Voyage without going into Port, to *refit*. The Court held that this was a TOTAL Loſs; and that the Inſurers *might* ABANDON. 683 to 699. *V. infra* 1212: (where this Caſe is minutely ſtated, and compared with that of *Hamilton* v. *Mendes.)*

1ſt. "Whether the *Property* be CHANGED by the *Capture* "or not"—

1. Is a Queſtion immaterial, as *between Inſurers and Inſured*. 693 to 697.
2. This Queſtion can happen, but in two Caſes; *viz.* between the Owner and a neutral *Vendee*; or between the Owner and a *Recaptor*. 693 to 696.
3. Writers and Nations *differ in Opinion* upon it. Some hold it to be aſſoon as the *Battle is over*, all *immediate Purſuit ceaſed*, and all *Hope of Recovery* gone. *ibid.* Some hold that the Prize muſt be brought *Infra Præſidia*; Others, that 24 *Hours* quiet Poſſeſſion by the Enemy, is the Criterion; The *Engliſh* Courts of Admiralty, "not till *after* SENTENCE *of Condem*- "*nation*." 694.
4. But as *between Inſured and Inſurer*, the Ship is LOST *by the Capture*; whether carried into Port or not; or condemned, or not; or taken by Enemy, or Pirate: And the Inſurer muſt indemnify the Inſured, as to the *Loſs actually ſuſtained*; (though He

He is liable to *no more.) Page* 694. *V. infra* 1208, 1209.

5. And He ſhall ſtand in the *Place* of the *Inſured*, in Caſe of a Re-Capture or Abandonment. 694 to 698.

6. *Wager*-Policies, Intereſt or *no Intereſt*, gave Riſe to this Queſtion. 695.

2dly. In *general*, (though not univerſally,) If an inſured Ship be *taken*, the Inſured may demand, as for a *total* Loſs, and *abandon* to the Inſurer. 696, 697. and 1212, 1213.

3dly. So He may alſo, in Caſe merely of an *Arreſt*, or an *Embargo*, by a Prince not an Enemy. 696.

4thly. Yet there *may* be Circumſtances, under which a *Capture* would be but a ſmall or no Hinderance to the Voyage, and be ONLY *an Average*-Loſs: 697. As ſudden *Eſcape*, or immediate *Ranſom*. *ibid.* and *V. infra* 1209.

5thly. In *all* Caſes, the Inſured may chooſe NOT to abandon. 697.

6thly. But He can not elect to turn what was in its Nature but an *Average* Loſs, INTO *a total Loſs*, by abandoning. *ibid.*

An Inſured may *recover* for an *Average* or *Partial* Loſs, upon a Declaration for a *total* Loſs. 906 to 909.

The RULE *of eſtimating the Loſs*, upon a *valued* Policy, is "That the Inſurer ſhall pay to the Inſured the *like* PRO-"PORTION *of the Sum at which* the Goods are *valued in* "*the Policy*, as the *Price of the damaged Goods* bore to the "Price of the ſame Goods had they arrived *undamaged*, "at the Port of Delivery, *when* they were landed there." 1172, 1173.

1. This Proportion between ſound and damaged is *equally* the Rule, whether the Goods come to a *riſing* or to a *falling* Market. 1170, 1172.

2. The Inſurer has nothing to do with the *Riſe or Fall of the Market*, or with the *Speculations* of the Merchant. 1170, 1172, 1173.

3. He is only to put the Merchant in the *ſame* Condition (Relation being had to the prime Coſt or Value in the Policy,) as He would have been in if the Goods had arrived free from Damage. *ibid.*

4. And this *accrues* at the *Time* of the *Landing* of the Goods. 1153.

5. A VALUED Policy is *not* to be conſidered as a *Wager*-Policy, or like Intereſt *or* no Intereſt: The *only* Effect of the *Valuation* is *fixing the Amount of the prime Coſts*; (juſt as if the Parties admitted it at the Trial;) Which, in an *open* Policy, muſt be *proved*; in a *valued* One, ſtands *agreed*. 1171. And it is ſettled, that upon *valued* Policies, the Merchant needs only prove *ſome* Intereſt, to take it out of 19 *G.* 2. *c.* 37. *ibid.*

6. Yet if a valued Policy be uſed *merely as a* COVER to a Wager, it would be conſidered as an *Evaſion* of that Statute, and would not be ſuffered to defeat it. *ibid.*

The Queſtion, in general was Whether the Plaintiff (the Inſured) ought to recover for a TOTAL Loſs, when at the *Time of his Action* brought, at the *Time of his Offer to abandon*, and at the *Time of his being firſt apprized* of the inſured Ship's having been taken, He had *in rei veritate* only ſuſtained an AVERAGE-*Loſs*. *Page* 1198 to 1215.

1ſt. The Plaintiff upon a Policy, can only recover an Indemnity according to the Nature of his Caſe *at the Time* of the *Action brought*, or (at moſt) *at the Time* of his *Offer to abandon*. 1214.

2dly. Where the Event has fixed the Loſs to be an Average-Loſs only, *before* the Action brought, and *before* the Offer to abandon, and *before* the Plaintiff had Notice of any Accident, and conſequently *before* He could make any Election, He can recover for an AVERAGE-*Loſs only*. 1214.

3dly. But the Court gave *no* Opinion how it would, in Caſe a Ship or Goods inſured be reſtored in Safety, either

1. BETWEEN the *Offer to abandon*, and the *Bringing of the Action*. *ibid.*
2. Or BETWEEN the *Commencement* of the Action, and the *Verdict*. *ibid.*
3. Or AFTER THE MONEY PAID as for a total Loſs, and the Inſurer ſhould attempt to compel the Inſured to *refund* the Money and take the Ship or Goods. *ibid.*

4thly. *Change of Property*, by a Capture——

1. Does not happen before *Condemnation*. 1208, 1209. *V. ſupra* 693, 694.
2. By 29 *G.* 2. *c.* 34. §. 24. The *Jus Poſtliminii*, on a Recapture, continues for ever. 1209.
3. Is not material as between *Inſurer* and Inſured. *ibid.* *V. ſupra* 693 to 696.

5thly. The RIGHT TO ABANDON, in Caſe of a Capture and Re-capture, muſt depend upon the particular *Circumſtances* of the Caſe: It does *not* neceſſarily follow, "that "becauſe there is a Recapture, *therefore* the Loſs ceaſes "to be total." 1209. Nor ought the Inſured to recover (upon a Contract of Indemnity) as for a *total* Loſs, when the *final Event* has decided that the Damnification is in Truth but an *Average*-Loſs at the moſt. 1209 to 1213.

6thly. The Caſe of *Goſs* v. *Withers* was not ſimilar to this Caſe of *Hamilton* v *Mendes*: Both Caſes ſtated and compared. 1212, 1213.

7thly. An *Over-Valuation*, or a Deſire to turn the *Fall of the Market* upon the Inſurer (who has no Concern in it,) are *Reaſons againſt permitting* an Inſured to *abandon*. 1213.

8thly. The Inſurer ought not to pay *leſs* than the VALUE *of the Loſs*; nor the Inſured to receive *more*. 1214.

9thly. An Inſured is *not obliged* to abandon, in any Caſe. 1211.

10thly. Where he has an *Election*, No Right to ſue as for a total

a total Loſs can *veſt* in Him *till* He has *made* that Election. *Page* 1211.

Poor-Tax. See *Orders, Statutes,* (43 *Eliz. c.* 2. §. 1.) *Manors, Quit-Rents, Heriots, Hoſpitals, Rates.*

Powers—

To make a JOINTURE—*C. Woolſton,* having deviſed his Lands in *S.* and in *B. H.* and in *W. O.* to the Uſe of his Eldeſt Son *James* for Life, with Remainder in Tail Male to *James*'s Sons; and in default of ſuch Iſſue, the like Limitations to his (the Teſtator's) Son *John*; with ſeveral Remainders over; and having deviſed other Lands to the Uſe of his Son *John*, and then to his ſaid Son *James*, in much the ſame Manner; inſerted a Proviſo in his Will, "That *James* and *John*, when they ſhould come into "Poſſeſſion of their Eſtate for Life, ſhould reſpectively "have full Power Liberty and Authority, FROM TIME "TO TIME *during his or their reſpective Life or Lives*, "by Deed *or Deeds* Writing *or Writings* to be by Him "or Them reſpectively ſubſcribed and ſealed in the Preſence of two or more credible Witneſſes, to *aſſign limit* "*or appoint* to or to the Uſe of or in Truſt for any *Woman* "*or Women* that ſhall be his or their reſpective *Wife or* "*Wives*, for and during the natural Life and Lives of "ſuch Woman or Women, for or in the Name or in "Lieu of their Jointure or Jointures, ALL *or any Part* of "the ſeveral Meſſuages Lands Tenements and Hereditaments to Him or Them (the ſaid *J. W.* and *J.* "*W.*) herein before reſpectively limited as aforeſaid." JAMES *made Uſe of this Power*, upon his Marriage in 1712, by ſettling Lands in *S.* with a proviſional Addition (during two Joint Lives) of Lands in *W. O.* (there being an Annuity payable to a Widow out of *S*:) In which Deed of Settlement there is a *Proviſo* for his Wife's *releaſing Dower*; and alſo a *Covenant* from *James*, "That "He had Power to make ſuch Appointment, and that his "ſaid Wife and his Sons by Her ſhall *enjoy according to the* "*Intent* of the ſaid Deed and of his *Father's Will*." In 1738, *James* RELEASES *this Proviſo*, "that his Wife "ſhall releaſe her Claim to Dower out of his Eſtate:" And in 1751, by Indenture, reciting, "That the Annuitant Widow was dead," and "that He had received "an *additional Fortune* of above 600*l.* which had fallen "to his Wife ſince their Marriage," He, as an INCREASE *to his Jointure*, aſſigns, limits, and appoints, *in* PURSUANCE *and* BY VIRTUE *of the* POWER *given him by his Father's Will*, and of all other Powers and Authorities that are in Him, ALL the Meſſuages Lands, *&c.* deviſed to Him by his Father's Will, in *W. O. B. H.* and *S.*

to

to Truſtees, to the Uſe of his ſaid Wife and her Aſſigns for her Life, as an AUGMENTATION *of her Jointure.* *Page* 1136.

1ſt. The INTENTION of this Power, in its *original Creation* was, that it might be executed at *different Times*, even upon the *ſame* Woman. 1144, 1147, 1148.

2dly. The Settlement made by *James* upon his Marriage in 1712, did NOT *prevent or bar* Him from making this *further* Proviſion for the *ſame* Wife. 1144, 1145, 1148.

3dly. The *Conſtruction of Powers* was brought *from Equity* to the *Common*-Law by the *Statute of Uſes.* 1146, 1147. *V. ante* 120.

4thly. *After* the Statute of Uſes, ſome *too ſtrict* Determinations were made at *Common*-Law, particularly in the Caſe of *Rattle* v. *Popham* (2 *Strange* 992.) *ibid.*

5thly. This *aroſe* from *not* conſidering theſe Powers brought into the Common-Law by the Statute of Uſes, merely as a *Mode of Ownerſhip or Property.* *ibid.*

6thly. *Executions* of Powers ſhould have the *ſame* Conſtruction Force and Effect in Courts of Law, as they have in Courts of EQUITY. Whatever is a good Power or Execution in Equity, the STATUTE *makes good at* Law: Whatever is an equitable Execution of a Power *ought* to be deemed a *Legal* One. *ibid.*

7thly. A Perſon having ſuch a Power, may do *leſs:* Or if He does more, it ſhall be *good*, to the *Extent* of his Power. *ibid.*

Practice.

A *Verdict found for the Defendant*, even againſt *Evidence*, ſhall *not* be *ſet aſide*, where the Plaintiff appears to have received *no real Injury*, and the Damages (if found for the Plaintiff) would be but a *mere Trifle.* 664, 665. *V. ante* 12, 54, 353. (And Note, that though *Verdicts* given upon *clear* and *full* Evidence ought *not* to be *ſet aſide*, Yet *Verdicts* AGAINST *Evidence*, or *againſt greatly preponderating* Evidence, *may: V. ante, pa.* 394 to 398.

1ſt. *Not arbitrarily*; but according to *legal, judicial* Diſcretion, and for the Attainment of Juſtice. *ibid.*

2dly. By a *Common-Law Court*, as well as by a Court of Equity. *ibid.*

3dly. Eſpecially, where *Fraud* interferes, the *Common-Law Courts* have a *concurrent* Juriſdiction with thoſe of Equity. *ibid.* See *Fraud.*

4thly. *This Power* is *eſſential* to Juſtice. *ibid.* It was *practiſed* by the Common-Law Courts, before 1648. *ibid.* It is for the *People's Benefit.* *ibid.* It is now done upon *leſs ſtrict Terms* than formerly; *viz.* only Payment of *Coſts.* *ibid.*

5thly. As well after Trials *at Bar*, as after Trials at *Niſi prius.* *ibid.*

A Judgment having been neglected to be entered up, and the Roll loſt, A Rule was made, directing the Clerk of the *Judgments*, to ſign and number and file a *new Roll*, thirty Years backward; making a Special Entry of the Day of *docqueting* it: But it was ordered, that it ſhould not be made Uſe of, againſt the Adminiſtrator of the Defendant. *Page* 722.

The preſent Courſe is, for the *Plaintiff's Attorney*, to undertake to make the Entry upon the Roll. 723. And He does it for 5*d. per* Sheet, which is allowed Him by the Chief Clerk, whoſe Fee is 8*d. per* Sheet. *ibid.* 723.

But as He acts herein *as* One of the *Clerks of the Chief Clerk*, the *Chief Clerk* is *liable to an Action* by a ſuffering *Purchaſer*: (Though the *Attorney* is indeed anſwerable *over*, to Him.) *ibid.*

A *Certiorari* having iſſued, to remove an Order of Seſſions; and a Rule having been obtained "to ſhew Cauſe "why the Order ſhould not be quaſhed;" the Proſecutors moved to *enlarge* the ſaid Rule: They ſhall not, *after* this, move to *quaſh the Certiorari*. 745.

As to *Habeas Corpus Cum Cauſa*. 758, 759, 779. See *Habeas Corpus Cum Cauſa*. 759, 779.

Upon *Articles of the Peace*. 780. See *Articles of the Peace*.

Upon *Judges Orders*. 781, 782. See *Judges Orders*.

A *Motion in Arreſt of Judgment* may be made, on the *Crown* Side, at *any* Time *before Sentence pronounced*. 801.

Service of Proceſs upon the *Day of the Return*, at any Time of that Day, is regular; though it be AFTER *the Riſing of the Court* on that Day. 812, 813.

High-Bar Money or *Box*-Money. 867, 868. See *High-Bar Money*.

After Conviction of a Miſdemeanour, the Defendant muſt be *preſent* in Court if He would *move in Arreſt of Judgment*; (though He needs not be ſo, upon arguing a *Special Verdict*.) 930, 931.

SECURITY *for anſwering* COSTS ſhall not be required of a *Scotch* Plaintiff, reſident in *Scotland*; nor even of a *Foreigner*. 1026.

Of CHARGING *Defendants* IN CUSTODY—The whole Method of it diſcuſſed, both *ancient* and *modern*, and both in *Term*-time and in *Vacation*. 1049 to 1053.

1ſt. A Priſoner *found in actual Cuſtody* may be *charged in Cuſtody*, notwithſtanding He was INTITLED *to be ſuperſeded*, if He was not *in Fact and actually* ſuperſeded. *ibid.*

2dly. *Formerly*, a Priſoner could not have been charged in Cuſtody, but *in* TERM-*time*, and (originally) by being *actually brought into Court*, by Rule. *ibid.*

3dly. But there ought to be *ſome* Method of doing it in VACATION-*time*. 1051.

1ſt. A *Habeas Corpus*, (*ad Reſpondend'*) teſted the laſt Day

Day of the preceding Term, and returnable in *this* Court (the *ſame* Court) on the firſt Day of the next Term, has been a Method thought by Practiſers to be ſufficient for the Purpoſe: But this Method is *unneceſſary* and *improper*. *Page* 1049, 1052.

2dly. The RIGHT *Method* is To *file a Bill as of the* PRECEDING *Term*; and deliver or leave a *Copy of the Declaration*, as of the *preceding* Term, and make an *Affiduvit* of having delivered it to or left it for the Defendant being in Cuſtody. 1052.

Motions for Views. See *View*. 250 to 259.

Payment of Money into Court. Where the Sum demanded is a *Sum certain*, or capable of being *aſcertained by mere Computation*, a Payment into Court ſhall be admitted; and ſo much ſtruck out of the Declaration. 1120.

Money may be *paid into Court* and ſtruck out of the Declaration, upon only *ſome* of the Breaches, though more Breaches are aſſigned. *ibid.*

Unleſs the Plaintiff proves *more* to be due to Him, than the *Money brought into Court*, there muſt be a Verdict for the Defendant. 1120, 1121.

Preſumption

Muſt ariſe from ſome *Ground*; Something whereon to *found* it. 1072 to 1077.

In Favour of Perſons who have *ſufficient Power* to ſuffer *Common Recoveries*. *ibid.* and 1072 to 1077. See *Tenant in Tail.*

Printing—

Acts of Parliament, and *Abridgments of Acts of Parliament*—

1. The *King's Printer* is intitled, during the Term granted by Letters Patent of 13th *Octob.* 12 *Ann.* (for 30 Years from 10th *Jan.* 1739,) to this Right, *excluſive* of all other Perſons *not authorized by former Grants*. 664.

2. But the UNIVERSITY *of* CAMBRIDGE are, by Letters Patent of 26th *H.* 8. and 3 *Car.* 1. intruſted with a CONCURRENT *Authority* to print them WITHIN *the ſaid Univerſity*, upon the Terms mentioned in the ſaid Letters Patent. *ibid.*

Priſon, Priſoners—

In Execution, applying to be brought up. 747, 748. See *Statutes.*

Of *War*, taken on Board of an Enemy's Ship, ought to apply to the *Crown*, if his Caſe merits Relief: But this Court will *not* take upon Themſelves to ſet Him at Liberty, on a *Habeas Corpus*. 765, 766. See *Habeas Corpus.*

Inſolvent Debtors. 747, 748. and 799. and 901. See *Statutes* (under thoſe Pages.)

The *High-Bar Money*, or *Box*-Money, does *not belong* to them. 867, 868. See *High-Bar-Money.*

" The

"The MARSHALSEA-*Priſon* in the Burrough of *South-*
"*wark*"—is a Deſcription (in a Will, at leaſt,) of the *Palace-Court* Priſon, *not* of the King's Bench Priſon. *Page* 1037 to 1039.

The Method of *Charging them in Cuſtody*; and the whole Practice of it, (both ancient and modern, and both in Term-time and in Vacation.) 1049 to 1053. See *Practice.*

Procedendo

Granted to a *Quarter-Seſſions*; becauſe the *Certiorari* had not iſſued, till *after* the Defendants had CONFESSED the Aſſault *below*. 749.

To the *Sheriff's Court in London*. 758, 759. See *Statutes.*

To a *Corporation* whoſe *By-Law* directed a Penalty to be ſued for in *their own Court* and *not elſewhere*. 775 to 780. See *Habeas Corpus cum Cauſa.*

Proceſs

May be *ſerved* at *any* Time of the Return-Day, although it be AFTER the *Riſing* of the Court. 812, 813.

Prohibition—

To the *Spiritual Court*—ſhall *not* be granted, where they *have Juriſdiction* and have *pronounced Sentence*; (For in ſuch Caſe, the Remedy muſt be by *Appeal:*) But if They proceed where they have NO *Juriſdiction* at all; a Prohibition may be applied for, AFTER *Sentence.* 813.

Promiſſory Note. See *Bill of Exchange.*

An original *unindorſed* Promiſſory Note has no Reſemblance to a Bill of Exchange. But when once *indorſed*, it has an exact *Analogy* to a *Bill of Exchange.* The *Indorſer* then reſembles the *Drawer* of a Bill; The *Maker*, the Acceptor of a Bill; and the *Indorſee*, the *Payee* of a Bill. And Promiſſory Notes, and *Inland Bills of Exchange*, are juſt upon the ſame Footing. 676, 677. A Confuſion has ariſen from Calling the Maker of a Note "the Drawer." *ibid.* and 678.

The *Indorſee* is bound to apply to the MAKER of the Note: And if he is guilty of a *Neglect*, and the Maker becomes inſolvent, the Indorſee loſes the Money, and can not come upon the Indorſer at all. 676. And if the Indorſee of a Note brings an Action againſt the Indorſer, He (the Plaintiff) *muſt prove a Demand* of, *or due Diligence* uſed to have gotten the Money from the MAKER of the Note. 676, 677, 678.

Bills of Exchange, and *Promiſſory Notes* are under the SAME *Rules of Determination.* 1224, 1227. See *Bill of Exchange.*

Made

Made payable to One *or Order:* but indorſed to Another, OMITTING the Words—"*or Order*," in the Indorſement. *Page* 1216 to 1229. See *Bill of Exchange* (S. C. at large.)

Proof

Of having SWORN *an Anſwer in Chancery*—is ſufficient, if the *Name* be proved to be the Perſon's *Hand-Writing*, and the *Jurat'* be proved to have been ſubſcribed by the *Maſter*; though there be no Evidence of *Identity of* the Swearer's *Perſon*, or of his *actual Swearing:* At leaſt, This puts it *upon the Defendant* to ſhew a reaſonable Suſpicion that He was perſonated. (This was upon an Indictment for Perjury.) 1189.

Quakers

THE ſolemn AFFIRMATION of a Quaker (together with tendering 20 *l.* purſuant to 26 *G.* 2. *c.* 18.) intitles Him to *Admiſſion into the* TURKEY COMPANY, without taking the OATH preſcribed by that Act: For the Statute of 22 *G.* 2. *c.* 46. "for allowing Quakers to make Affirmation, in Caſes where an Oath is "or ſhall be required," allows it, (by §. 36.) And this is NO Office or Place of Profit *in the Government*; (which is One of the 3 Exceptions in §. 37 *& ult*) 999 to 1005.

The *Affirmation* of a Quaker can not be read in *Support* of a CRIMINAL Charge; nor even in *Exculpation* of ſuch a Charge made upon a THIRD *Perſon*, (the Quaker *Himſelf* not being charged at all, but only collaterally aſſiſting to exculpate the *other* Perſon:) But it may be read in *Defence* of a Criminal Charge upon HIMSELF, in Order to exculpate *Himſelf*. 1117.

Quit-Rents

Of a Manor, are *not rateable* to the *Poor-Tax*. 991 to 993. See *Manor*.

Rates.

POOR-Rates ſhould (as it ſeems) either be made *Monthly*, or at leaſt divided and diſtributed into ſo much *per Month*. 1157.

If a *Warrant of Diſtreſs* be made, upon Refuſal to pay a Rate demanded; and *before Execution* of it, the Offender *dies*; *Qu.* Whether it can be executed upon his Goods and Chattles in the *Hands* of his REPRESENTATIVE. 1152 to 1159.

1ſt. There may be a Doubt whether ſuch a Diſtreſs would be lawful, after a *previous Demand* of the Money made *upon the Repreſentative*. *Page* 1157, 1158, 1159.

2dly. But it is clearly bad, WITHOUT ſuch a *Demand* upon Him. 1159.

Recordari facias Loquelam

Stays all further Proceeding in a County Court, if delivered after interlocutory but *before final* Judgment. 1151, 1152.

The Officer of the inferior Court can not refuſe Obedience to the Writ, under Pretence of his *Fees* not being paid Him. 1152.

Relation. See *Fiction*, *Teſte*, *Pleading*, *Declaration*.

Of a *Bankrupt's Certificate* (when allowed,) to the *Time of Signing*. 716 to 719. See *Bankrupt*.

Of a Bankruptcy ariſing from *lying 2 Months in Priſon*, to the *Time* of the *firſt* Arreſt. 817 to 820. See *Bankrupt*.

Where a Deed of *Bargain and Sale* "to make a Tenant "to the *Præcipe*," and a *Common Recovery*, when Both are completed, ſhall be conſidered as ONE *Conveyance* and to *relate* to the Date of the *former*. 1134. See *Deviſe*.

Repleader.

The COSTS *of the* AMENDMENT of a Plea, which requires ſuch a ſlight Alteration in it and in all the ſubſequent Pleadings, as *not to deface the Record*, ſhall be allowed in Proportion to NECESSARY *Alterations only*, and no more. 757, 758.

The Expence of *adviſing* whether to *reply de novo*, ſhall in all Events be allowed to the Proſecutor; and He is at Liberty to do it if He pleaſes: But *if* He does *not* judge proper to do ſo, He muſt *not* have Coſts as if He actually had. 758.

Return

Of *Nulla Bona*, upon Executions againſt *Bankrupts*. 817 to 820. See *Bankrupt*.

Richmond-Park—

FOOT-*Ways* through *Richmond-Gate* and through *Eaſt-Sheen-Gates*, acroſs it, were eſtabliſhed: *Contra*, for CARRIAGES, or for HORSE-People. 908, 909.

Sacra-

Sacrament—

BY 13 *C.* 2. *Stat.* 2. *c.* 1. No Perſon could be elected to any *Office in a Town Corporate* who had not received the Sacrament according to the Rites of the Church of *England*, *within a Year* next before his Election: And upon *this* Statute, it was incumbent upon the Perſon elected, to *prove* this Fact, upon an Iſſue of "*Non fuit electus*" taken upon a *Mandamus* to ſwear Him in. *Page* 1014, 1015. Becauſe, elſe, his Election was *void*. *ibid.*

But *ſince* the Statute of 5 *G.* 1. *c.* 6. §. 3. Such Election is *not* VOID, but *only* VOIDABLE in Caſe of Removal or Proſecution *within ſix Months*. *ibid.*

And therefore an Officer IN POSSESSION *of his Office*, who brings a *Mandamus* for the *Records and Inſignia* belonging to it, is NOT *obliged* (ſince the 5 *G.* 1. *c.* 6.) to *prove* this Fact, upon an Action for a falſe Return of "*Non fuit electus*" made to ſuch *Mandamus*; even although ſuch Return was actually made *within* the ſix Months. *ibid.*

But a Perſon NEVER ADMITTED into the Office would *not be within* this latter Statute of 5 *G.* 1. becauſe He could neither be removed nor proſecuted. *ibid.*

Scire facias—

To *revive a Judgment of above a Year's Standing*. 660. See *Execution*.

Againſt Bail. 1187, 1188. See *Execution*.

Scotland.

Edward the 1ſt maintained "That it was HOLDEN *of the* "*Crown of England*." 851.

He often *exerciſed* that *Juriſdiction* which reſulted to Him *as ſuperior Lord*. 850, 851, 852.

The Court of *King's Bench* actually *ſat at Roxburgh*. 852.

Edward 3d *renounced* all Pretenſions to it, in Property or Superiority, *diviſum à Regno Angliæ*. 852.

Since the Union, In *general Acts of Parliament* not intended to include *Scotland*, the Method is, to *declare* therein, by Proviſo, "That the Act does not extend to *Scotland*." 853.

Edward the firſt extended the Rules of Complaints againſt the King of *Scotland*, that they might be TRIED by a Jury of *Northumberland*, or *any other County*; or before *Commiſſioners* to be appointed by Him. 860. See *Berwick*.

Security of the Peace. See *Articles of the Peace*.

Sentence

Sentence (pronounced on Criminals convicted.)

An *Under-Sheriff* of *Middlesex*, instead of setting Dr. *Shebbeare* (who had been convicted of writing and publishing a Treasonable Libel) IN and upon the Pillory, according to his Sentence, suffered Him to stand *in a sort of Triumph*, *Erect* upon the Pillory, *without* putting his Head, Neck Arms or Hands *through* the Holes; with a *Servant* in Livery holding an *Umbrella* over his Head. An Attachment issued for this, as for a Contempt: And He was *fined* 50*l.* and committed to the Marshal for 2 *Months*. *Page* 794 to 798. See *Pillory*.

For *gross and malicious* PERJURY in *Articles of the Peace*—Pillory once; and TRANSPORTATION for *seven* Years. 806. See *Articles of the Peace*.

For a CONSPIRACY to indict for a *Capital* Crime. 996, 1027. See *Indictment*, *Judgment Villainous*.

Service

Of *Process*—May be at *any* Time of the Return-Day; although it be long AFTER *the Rising of the Court*. 812, 813.

Sett-off (of mutual Debts.)

Is extremely *beneficial* to the Subject. 823.

It was *first given* by 2 *G.* 2 *c.* 22. §. 13. a *temporary* Act. But 8 *G.* 2. *c.* 24. §. 5. *perpetuates* this Clause of 2 *G.* 2. (which enacts generally, "That where there are *mutual Debts* between the Parties, One may be set against "the other:") And as Doubts had arisen upon the former Act, about the *different Natures* of Debts, the latter makes a *general* Provision (*viz.* "*notwithstanding* such Debts are "deemed in Law to be of a different Nature,") without Exception, "*unless* in Cases where either of the said "Debts shall accrue by Reason of a *Penalty* contained "in any Bond or Specialty;" In which Cases, the Debt intended to be set off shall be *pleaded in Bar*, and the Plea shall shew how much is *truly and justly due* on either Side, and Judgment (if the Plaintiff recovers) shall be entered for *no more* than shall appear to be *truly and justly due* to the Plaintiff. 822, 826.

Since these two very beneficial Acts, *Stoppage* or *Setting-off* of mutual Debts is *become equivalent to actual Payment*; and a *Balance shall be struck*, as in Equity and Justice it ought to be. 825.

But at COMMON LAW, *before* these Acts, if the Plaintiff was *even more* indebted to the Defendant than the Defendant to Him, He could only go into a Court of Equity. 826.

BEFORE 8, 9 *W.* 3. *c.* 11. §. 8. a Plaintiff could *only* aſſign ONE *Breach* upon a Bond or Indenture, where the Covenants or Agreements were to be performed at *different Times*, or the Monies paid by *Inſtalments*, &c; And if the Defendant had *only paid Part* of the Debt, yet the *Judgment* was taken for the WHOLE *Penalty*, and *ſtood as a Security* for the Reſidue of the Demand: Which often forced Defendants into Equity, for Relief. *Page* 824.

To prevent which, this laſt Statute was made: Which gives the Plaintiff Liberty, in an Action upon Bond or penal Sum for Non-Performance of Covenants, to aſſign *as many* Breaches as he thinks fit, and directs *Damages and Coſts on all proved*, and Judgment thereon. Then it provides, That if after Judgment, and *before Execution*, the Defendant ſhall *pay into Court* all the Damages and Coſts, a *Stay of* EXECUTION ſhall be entered; or if *after* Execution, the Plaintiff ſhall be fully paid all the *Damages Coſts and Charges*, the Defendant ſhall be *diſcharged of the* EXECUTION: But yet, in each Caſe, ſuch JUDGMENT *ſhall remain* as a further *Security againſt* FURTHER *Breaches*; and the Plaintiff may have a *Scire facias* upon it, ſuggeſting *other* Breaches; whereupon, there ſhall be the like Proceedings as at firſt; and on Payment or Satisfaction (as before,) Proceedings ſhall be again ſtayed, (and ſo *toties quoties,)* and the Defendant ſhall be diſcharged out of Execution as aforeſaid. 824, 825.

BEFORE this laſt Statute, ACTUAL *Payment* was upon the ſame FOOT, as a SET-OFF is *now* put upon: And a *Plea of Payment* of the *whole* Demand was juſt the ſame *then*, as a *Set-off* equal to the *whole* Demand is *now*. 825.

But, *if* there had been a *Failure* in Payment of *any* PART, the Plaintiff would have been intitled to JUDGMENT for the *whole* Penalty, (though EXECUTION was to be ſtayed on Payment as above) and this *Judgment for the whole Penalty* was to ſtand as a *Security* to anſwer *future* Breaches 825.

The Payment here intended muſt have been an ACTUAL *Payment*: For *Stoppage* or *Setting off* was not *then* equivalent to actual Payment; but *Croſs-Actions* muſt, at *that* Time, have been brought: *ibid. V. ſupra* 822, 825.

The WHOLE *Penalty* can not be pleaded by way of Set-off; (Eſpecially where the Penalty ſounds in *Damages*.) 1025, 1026.

Brown and *Baſkerville* had mutual Demands. Each brought his Action. *Brown gave Notice to ſet off: Baſkerville* gave no ſuch Notice. Both Cauſes were tried at the very ſame Sittings: But *Brown* v. *Baſkerville* happened to be tried firſt; and *Brown* took a Verdict for his whole Demand. Then the Cauſe of *Baſkerville againſt* Him came on: And *Brown* would have ſet off, but *was not permitted*; And *Baſkerville* had a Verdict for his whole Demand. This Verdict

Verdict againſt *Brown* was ſet aſide; and *Brown* had Coſts of a Non-Suit: But *Brown* was ordered to *remit* ſo much of the Damages recovered *by Him* againſt *Baſkerville* in the other Action, as *exceeded* the Balance of the mutual Debts between them. *Page* 1229 to 1232. Reſolved as follows——

1. A Plaintiff cannot *compel* a Defendant to ſet off. 1230.
2. *Brown* had a Right, *at the Time* when he gave the Notice, to give it. 1231.
3. His Right to make the Set-off *remained* in Him *after his own Verdict*; which neither extinguiſhed his Debt, nor changed its Nature, (for Judgment was not ſigned,) but only amounted to concluſive Evidence of it. 1231.
4. *Brown* could not with Safety, have taken his Verdict for *leſs*. *ibid.*

Sheriffs and their Bailiffs—

Are obliged to let Perſons out *upon Bail*, upon reaſonable Sureties of ſufficient Perſons. 926

It is *Oppreſſion*, to take *Money* for doing it; and puniſhable by *Attachment*, or Indictment. *ibid.* and 927, 928.

Ship. See *Policy*, *Inſurance*.

Capture of it. 690 to 698. See *Policy*.

Recapture of a taken Ship. *ibid.* And ſee *Policy*, *Statutes*.

Mortgage of it. 941. See *Bankrupt*, *Mortgage*.

Stamps

Upon COPIES *of Bills* in *Equity*. 1177 to 1181. See *Copies*, *Statutes*.

Statutes. See *Conſtruction*.

12 *G.* 1. *c.* 29. §. 1, 2, 655, 656. See *Bail*.

34 & 35 *H.* 8. *c.* 9. §. *ult.* } 656 to 661. See *Navigation*.
19 *G.* 2. *c.* 22. §. 1. 2. }

22, 23, *C.* 2. *c.* 25. §. 7. againſt *Stealing Fiſh*. 682. See *Conviction*.

29 *G.* 2. *c.* 34. §. 24. (the *Prize*-Act) concerning *Ships taken* by the Enemy, and RETAKEN by Men of War or Privateers. 683 to 698. See *Policy of Inſurance*.

9, 10 *W.* 3. *c.* 15. "for Determining Differences by Arbitra-"tion"—was made to put Submiſſions to Arbitrations, where no Cauſe was depending upon the *ſame Foot* as thoſe where there *was* a Cauſe depending: And it is only *declaratory* of what the Law was before, in the *latter* Caſe. 701.

12 *Ann. c.* 16. 716. and 891, 892. See *Uſury*.

3, 4 *W.* & *M. c.* 12. §. 9. concerning Surveyors of Highways. 745, 746. See *Orders*.

3 *J.* 1. *c.* 8. (to avoid unneceſſary Delays of Executions.) 746, 747. See *Bail*, *Error*.

3 *G.* 2. *c.* 27. } *All* theſe Acts, which are explanatory of
8 *G.* 2 *c.* 24 } 2 *G.* 2. *c.* 22. are REVIVED by 29 *G.*
14 *G.* 2. *c.* 34. } 2. *c.* 28. as well as the Act of 2 *G.* 2.
21 *G.* 2. *c.* 33. } *c.* 22.

2. *G.* 2. *c.* 22. is revived by 29 *G.* 2. *c.* 28. *Page* 747, 748. See *laſt Article above.*

29 *G.* 2. *c.* 28. 747, 748. See *the two laſt Articles above.*

12 *Ann. Stat.* 1. *c.* 18. §. 2. An *Apprentice to a Certificate-Man, uncertificated* at *Binding*, but *afterwards certificated* before the Apprentice had ſerved Him 40 *Days*, gains *no* Settlement: For this Act makes it a *Condition* PRECEDENT to his Gaining a Settlement, "That He muſt have been bound to *and ſerved for* 40 DAYS, a Maſter who neither came into, NOR RESIDED IN the Pariſh by Licence of a Certificate." 752, 753. See *Orders of Removal.*

4, 5 *Ann. c.* 16. §. 4, 5. (concerning Pleading many ſeveral Matters—) *Both Plaintiff and Defendant* obtain Judgment, Each againſt the Other. 754, 755. See *Pleading, Coſts.*

11 *G.* 2. *c.* 19. §. 13. 756. See *Ejectment.*

21 *J.* 1. *c.* 23. §. 1, 2. directs "That no Writs to remove "Suits out of Inferior Courts (except Writs of Error or "Attaint,) ſhall be received or allowed, *unleſs* DELI-"VERED *before Iſſue or Demurrer*; So as the ſaid Iſſue "or Demurrer be not joined within ſix Weeks next "after the Arreſt or Appearance of the Defendant." 758, 759.

1ſt. The PRACTICE of the *Sheriff's Court in London* is, "to *allow* the *Habeas Corpus*, provided it be delivered "at *any* Time *before the* JURY *is* SWORN." 759.

2dly. The *Habeas Corpus* was not delivered (there in that Court) *till* AFTER *an* INTERLOCUTORY *Judgment ſigned*, and Notice of executing a Writ of Inquiry; yet a *Procedendo* was denied. *ibid.*

29 *C.* 2. *c.* 7. (for the better Obſervation of the Lord's Day.) 787, 788. See *Baker.*

2 *G.* 2. *c.* 22. (for the Relief of *Inſolvent Debtors* with reſpect to the Impriſonment of their Perſons) was a *temporary* Act. It was explained and amended by 3 *G.* 2. *c.* 27. and continued by 8 *G.* 2. *c.* 24. and 14 *G.* 2. *c.* 34. (which *perpetuates* the Clauſe for ſetting *mutual Debts* One againſt the Other;) and again amended and continued by 21 *G.* 2. *c.* 33. and finally revived and continued by 29 *G.* 2. *c.* 28. *until* 1*ſt June* 1759: And *then* it expired. The 32 *G.* 2. *c.* 28. takes it up again. But this Act of 32 *G.* 2. *c.* 28. does *not commence* till the 15*th* of the ſame *June*: So that there is a *Chaſm of* 14 *Days*, during which Nothing can be done upon 2 *G.* 2. *c.* 22. But the Priſoners are within the Proviſion of the *new* Act, 32 *G.* 2. *c.* 28. §. 13. 799. *V. ſupra* 747, 748. *infra* 824 to 827. and 901.

If

If a Statute *creates* a NEW Offence, and preſcribes a *particular Method of Proceeding*, Such *particular Remedy* muſt be *ſpecifically purſued*, and an *Indictment at Common* Law will *not* lie: But if it was an Offence *puniſhable* BEFORE the Making of the Statute which preſcribes the particular Method of Proceeding, In *ſuch* Caſe the particular Remedy is CUMULATIVE, and does *not* take away the former Remedy; but an *Indictment at Common* Law will lie. *Page* 805. See *Indictment*. 545, 805.

13, 14 *C.* 2. *c.* 12.
3, 4 *W. & M. c.* 11. } An Overſeer *refuſing to receive a removed Pauper*, is an Inſtance of this. 803, 804.

43 *Eliz. c.* 2 §. 7, 11. A Grandfather refuſing to obey an Order of Seſſions "to provide for his Grandſons"—is another. 803 to 806. See *Indictment*. 803 to 806.

8, 9 *W.* 3. *c.* 11. §. 8.
2 *G.* 2. *c.* 22 §. 13
8 *G.* 2. *c.* 24. §. 5. } Moſt clearly and excellently explained. 824 to 827. See *Set-off*. See alſo *ſupra* 747, 748. and 799.

22 *C.* 2. *c.* 12. § 9. (about ſending Men and Teams to the Highways.) 832. See *Indictment*.

9 *Ann. c.* 20. § 4. An Information againſt a *whole* Corporation *as a* BODY muſt be brought by the *Attorney General*, on Behalf of the *Crown*. 869. See *Information*.

26 *G.* 2. *c.* 33. §. 11. (for the better preventing of *Clandeſtine Marriages*,) is made againſt *Both* Parties: And a Marriage contrary to it is ABSOLUTELY *void*. 898, 899.

32 *G.* 2. *c.* 28. §. 13. (for *Relief of Debtors* with Reſpect to the Impriſonment of their Perſons *&c.*) was *favourably conſtrued*, ſo as to obviate any Inconvenience from the Chaſm of 14 Days, and to ſerve the *Intention* of the Act, which did not deſign this Omiſſion, 901. See *above*, 799.

23 *H.* 6. *c.* 10. though a PRIVATE Act, ſo far that it muſt be *pleaded* in Caſes ariſing immediately and directly upon it, yet does not prevent a Court of Juſtice from taking *judicial* Notice "That a Sheriff's Officer is *obliged to admit to Bail*, in an *Action upon the Caſe*, provided that "unexceptionable Bail be offered Him:" And He is puniſhable if He *takes Money* for ſo doing; becauſe it is his *Duty* to do it. 926, 927, 928.

21 *J.* 1. *c.* 16. §. 3. Of *Limitation*—The TRUE *Time of ſuing out a* LATITAT may be *ſhewn*, where it is *material*; notwithſtanding the *Teſte*. 966. See *Pleading*, 950 to 969. See *Latitat*, 961 to 967.

43 *Eliz. c.* 2. §. 1. Neither *Quit-Rents*, nor *Heriots*, or other *Caſual* Profits of a Manor, are *rateable* to the *Poor-tax*. 999.

13, 14 *C.* 2. *c.* 1.
1 *W. & M. c.* 18. §. 13.
7, 8 *W.* 3 *c.* 34.
8 *G.* 1. *c.* 6.
22 *G.* 2. *c.* 46. §. 36, 37. } 1002, 1003. See *Quakers*.

26 *G.* 2. *c.* 18. *Page* 943, and 999 to 1005. See *Turkey-Company, Mandamus.*

13 *C.* 2. *Stat.* 2. *c.* 1. (for the well regulating and governing Corporations.)
5 *G.* 1. *c.* 6. (for quieting and eſtabliſhing Corporations,) §. 3. } 1015, 1016. See *Sacrament.*

2 *G.* 2. *c.* 22. §. 13.
8 *G.* 2. *c.* 24. §. 5. } The WHOLE *Penalty* of a Bond can not be pleaded by way of Set-off. 1025, 1026. See *Set-off.*

5 *Eliz.* *c.* 4. §. 31.
1 *Jac.* 1. *c.* 22. §. 5.
8, 9 *W.* 3. *c.* 26. } Where it is, or is not neceſſary to *ſpecify* in the particular Words of a Statute: And where *Excuſes* or *Exceptions* out of Statutes muſt come on the Part of the *Defendant*, by *Plea* or Evidence. 1036, 1037. See *Averment, Conviction, Indictment.*

22 *Car.* 2. *c.* 1. (the *Conventicle*-Act—) A *Certiorari* lies to remove Orders made upon it; even *after* Appeal, Trial, Verdict, and Judgment. 1040 to 1042. See *Certiorari.*

4, 5 *Ann.* *c.* 16 §. 8.
3 *G.* 2. *c.* 25. §. 14. } See *View.*

16 *C.* 2. *c.* 7. §. 3.
9 *Ann.* *c.* 14. §. 1. } 1080, 1082. See *Gaming.*

13 *C.* 2. *St.* 2. *c.* 2. §. 8, 9, 10. 1096, 1097. See *Damages, Error, Intereſt.*

9, 10 *W.* 3. *c.* 36. 1117 to 1120. See *New Foreſt.*

1 *Jac.* 1. *c.* 15.
5 *G.* 2 *c.* 30. §. 1. } 1123, 1124. See *Bankrupt.*

31 *G.* 2. *c.* 36. § 28.
33 *G.* 2. *c.* 22. § 1, 6. } 1149, 1150. See *Militia.*

12 *G.* 1. *c.* 34. (§. 1.) to prevent unlawful *Combinations* of Workmen employed in the Woollen Manufactures &c. 1163 to 1167. See *Conviction.*

18 *C.* 2. *c.* 2.
20 *C.* 2. *c.* 7.
32 *C.* 2. *c.* 2. §. 9.
31 *G.* 2. *c.* 28. } Concerning the Importation of Butter *from Ireland.* Butter exported from *Ireland* to LISBON, and FROM LISBON into this Kingdom, is not to be conſidered as included in the Statutes prohibiting the Importation of it *from Ireland* into this Kingdom. 1173 to 1176. See *Conviction.*

5, 6 *W.* & *M.* *c.* 21.
9, 10 *W.* 3. *c.* 25.
30 *G.* 2. *c.* 19.
32 *G.* 2. *c.* 35. } 1177 to 1181. See *Stamps, Copies.*

10, 11 *W.* 3. *c.* 23. §. 2, 3. An Act for the better apprehending proſecuting and puniſhing of Felons that commit Burglary, Houſe-breaking, or Robbery, in Shops, Warehouſes, Coachhouſes or Stables, or that ſteal Horſes. 1182 to 1186. See *Certificate.*

17 *G.* 2. *c.* 5. "to amend and make more effectual the "Laws relating to *Rogues and Vagabonds &c*" §. 1, 4, 16, 17. The *Quarter-Seſſions* have Juriſdiction to *overhale the Conſtable's* Accounts. *Page* 1198.

29 *G.* 2. *c.* 34. §. 24. (the Act for the Encouragement of Seamen, and the more ſpeedy and effectual Manning his Majeſty's Navy.) 1209. See *Policy of Inſurance.*

2 *G.* 2. *c.* 22. §. 13. (about Setting One *mutual Debt* againſt Another.) 1229 to 1232. See *Set-off.*

Surgeon—

Underſtanding LATIN, is a previous Qualification to being even put *Apprentice* to a *London* Surgeon. 896. See *By-Law.*

Surrender—

Of a *Life-Eſtate*, by Tenant for Life, to impower a *Remainder-Man in Tail* to ſuffer a Recovery—In what Caſes an *actual* Surrender ſhall be PRESUMED to have been made: In what, not. 1072 to 1077. See *Tenant in Tail.*

Tanner—

EXERCISING the Occupation, without 7 Years Apprenticeſhip. 1035 to 1037. See *Indictment.*

Tenant in Tail. See *Common Recovery.*

May turn his Eſtate into a *Fee*, or *alienate* it for his own Benefit, by DULY *ſuffering a Common Recovery.* 1072.

But He muſt have a *ſufficient Eſtate and Power*, to qualify Him to ſuffer it. *ibid.* He muſt either be the Tenant in Tail in *Poſſeſſion*; Or he muſt have the *Concurrence of the Freeholder* who claims *prior* to Him under the *ſame* Settlement. *ibid.*

This Principle is adhered to, by 14 *G.* 2. *c.* 20: Which Act means to preſerve the ſame Negative to Perſons *claiming under the Family-Settlement*, as they had before. *ibid.* and 1075.

Where a Perſon has POWER *to ſuffer* a Common Recovery, *Omnia præſumentur* rité et ſolenniter acta, until the Contrary appears: But if the *Contrary appears*, there is an *End* of the *Preſumption.* 1073, 1074.

1ſt. Where the Freeholder is a *Truſtee* for the Tenant in Tail and *under his Direction*, it is a Cauſe for preſuming "that Every Thing was rightly tranſacted." 1073.

2d. So, where the Perſons intereſted to object, *have had Opportunity* to do ſo, but inſtead of diſputing the Validity of the Recovery, have *acquieſced* under it, *Page* 1073.

3d. So alſo is *long Poſſeſſion* by the Tenant in Tail *after* the Death of the Tenant for Life: Becauſe, as the Tenant in Tail had Opportunity to ſet it right, if it had been wrong, and *did not*; it may be *preſumed* "that He *knew* "it to be *regular*, and *not defective*." 1072, 1076.

4th. An *Actual Surrender* by the Tenant for Life ſhall be *preſumed* in theſe and the like Caſes, where there is *ſufficient Ground* for ſuch a Preſumption. *ibid.*

5th. But no *Preſumption* can be made without ſome *Facts* or *Circumſtances* whereupon to *found* it; much leſs, *againſt* Probability. 1073, 1074.

6th. Mere *Length of Time* from the *Suffering* of the Recovery, is not *alone* of itſelf any Ground for ſuch a Preſumption: Though long Poſſeſſion by the Tenant in Tail AFTER *the Death of the Tenant for Life* is a Ground for it, for the Reaſon above-mentioned (under the 3d Subdiviſion.) 1072, 1075, 1076.

Teſte—

Of a *Latitat* ſhall not preclude from ſhewing the TRUE *Time of ſuing it out*, when that is *material*. 966. See *Pleading*, 950 to 969.

Of a *Latitat* ſued out in *Vacation*, *muſt* be of the *preceding Term*. 963, 964.

A *Latitat* may bear Teſte *before* the Cauſe of Action, if really proſecuted after it. But an *Original* is abateable, if it bears Date before the Cauſe of Action. 967.

Treſpaſs—

Action of Treſpaſs for *Meſne Profits*, and *Coſts*, after a Judgment in Ejectment. 667, 668. See *Meſne Profits*, *Ejectment*.

Treſpaſs *vi et armis* and Treſpaſs on *the Caſe* cannot be joined in the ſame Action. 1114.

The *Diſtinction* between them. *ibid.* It may *eventually* come out to be One or the Other, *according to the Evidence* given at the Trial. *ibid.*

Trial.

Where a Court has Juriſdiction of the Matter; if it can not be tried *in* the Place, it ſhall be tried as *near* it as may be. 859. See *Berwick*.

So all *local* Matters in *Wales*. So, as to *Ireland*. So, as to the *Cinque-Ports*. So, as to the Iſle of *Ely*. *Page* 859.

Turkey-Company—

Admiſſion into it. See *Quakers, Mandamus*.

Verdict—

VERDICTS are to be taken *favourably*, not ſtrictly (like Pleadings:) And if the Court can *collect* the clear Meaning of the Jury, They will work it into *Form*, and make it ſerve. 699, 700. See *Error*.

A Verdict ſhall not help, where the *Conſideration* manifeſtly appears, upon the *Face of the Declaration*, to be illegal. 926 to 929.

May be ſet aſide WITHOUT *Coſts*, upon Circumſtances. 1224, 1228. See *Bill of Exchange*.

Univerſity of Cambridge

Has a *concurrent* Right with the King's Printer, to PRINT *Acts of Parliament* and *Abridgments of Acts of Parliament* within the Univerſity, upon the Terms in their Letters Patent. 664. See *Printing*.

Uſury.

A *Real bonâ fide* WAGER, not at all intended as a Loan, is *not* an Uſurious Contract: But an *Uſurious* LOAN, *diſguiſed as a Wager* (with Intent to have a Shift,) *is* ſo. 716.

A *Bond* in the Penalty of 200*l.* was conditioned for the Performance of Articles. The Articles recited that the Obligee had lent the Obligor 100*l.* to be repaid at the End of 4 Years, WITHOUT *Intereſt*; But in Conſideration that the Obligor his Executors and Adminiſtrators ſhould *find and provide* for the *Obligee's Daughter*, *Meat and Drink* in his Houſe for 4 Years, and alſo *Board*; And that She ſhould be *Co-partner with his Wife* in the Buſineſs of a Milliner, and *equally Share* in the *Profits*, and bear Half the Loſſes, Charges (except Houſe-keeping,) *Shop-Rent*, and *Materials* (which the Obligor agreed to provide;) And alſo that the Obligor ſhould *lodge the Obligee*, She *paying Him* 10*l. a Year:* And at the End of the 4 Years the Obligor to repay the 100*l.* Principal Money; And *in Caſe of the Death* of the Obligee's ſaid Daughter, to repay to the Obligee the ſaid Principal Sum of 100*l.* TOGETHER *with lawful Intereſt* for the ſame. 891, 892. This is *not*

not ſuch a Contract as can be adjudged by the Court to be uſurious within 12 *Ann. Stat.* 2. *c.* 16. *Page* 891, 892.

Wales—

CONtraſted with *Berwick.* 850, 851.
Aſſerted by *Edw.* 1. to be HOLDEN *of the Crown of England ibid.*
He iſſued a *Commiſſion* and *Writ*, and made the Statute of *Rutland*, all upon *that Plan.* 851.
The Statute of *Rutland* does *not annex Wales* to *England*; but recites it to have been "*prius Nobis Jure feodali ſubjectam:*" And 27 *H.* 8. *c.* 26. recites "that it was *ever* "ſo." 851.
Wales is *bound* by every Engliſh *general Act of Parliament:* The *Naming* of *Wales* particularly, is *ſuperfluous.* 853.
The *Juriſdiction* which the *King's Bench* exerciſes over Matters in *Wales*, is *not* given by any *Act of Parliament*, (as has been erroneouſly fancied by *Some*;) but depends upon Deductions from the *Principles of the Common Law*, in Conſequence of its TENURE, *viz.* its having been *holden of the Crown of England* before it came into the Hands of *Edw.* 1*ſt.* and its being deemed to be *within the Realm*, from that Time. 853.
All *local* Matters ariſing in *Wales*, triable in *B. R.* are by the *Common* Law to be tried by a *Jury of the* NEXT *County* in *England.* 859. See *Berwick.*

Window Tax. See *Orders, Hoſpitals.*

Words—

Libellous in themſelves, yet are *not actionable* where ſpoken or ſworn in a Man's *own Defence* againſt a Charge in a Court of Juſtice. 809 to 813. See *Affidavit, Libel.*

Writs—

What *Species* of Writs do, or do not RUN, to the *different* DOMINIONS of the *King*, or of the *Crown*; as *Ireland, Berwick*, the Iſle of *Man*, the *Plantations, Guernſey, Jerſey, (Calais*, formerly,) *Scotland* the *Electorate &c.* 855, 856. See *Berwick.*
When to be *dated.* 967, 968. See *Latitat, Original, Teſte, Limitation, Pleading.*

F I N I S.


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